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# Quotas and the Transatlantic Divergence of Corporate Governance

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# Quotas and the Transatlantic Divergence of Corporate Governance

*Véronique Magnier\* & Darren Rosenblum\*\**

*Abstract: The French adoption of a corporate board quota for women reflects Europe's increasingly stakeholder-oriented approach to corporate governance, one that stands in marked contrast with that of the United States. This Article discusses how the corporate board quota will shift French and European corporate governance. The change accentuates an already established stakeholder corporate culture widespread in Europe, most notably evidenced by the presence of worker representation on boards. In contrast, the United States' corporate governance structure increasingly places the shareholder at its center. The proliferation of quotas for women on corporate boards in the national and transnational European contexts is a factor that will further distinguish European corporate governance regimes from those of the United States. France's extensive history of public participation in private corporate governance stands in contrast with the liberal contract and property system of the United States. These historical divergences of stakeholder or shareholder orientations stand apart: in the United States, attention to stakeholder inclusion has remained an academic exercise, while French and European governance embodies substantial stakeholder inclusion. Integrating a critical mass of women into the world's largest economy's corporate management will revolutionize capital structures and the regulatory regimes that govern them. This Article argues that quotas may serve to heighten the divide between Europe and other regions on stakeholder/shareholder corporate governance.*

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### I. INTRODUCTION

The United States and Europe share a great deal in their economic governance. As the two largest developed economies, the commonalities have become especially apparent even as other regions develop more rapidly.<sup>1</sup> The move to adopt quotas for women on corporate boards, however, signals a departure from this harmonization of corporate governance. France's adoption of a quota for women on corporate boards reflects Europe's increasingly stakeholder-oriented approach to corporate governance. This approach recognizes that (1) shareholders, as simply the

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<sup>1</sup> For a discussion on rapid economic growth in Asia, see Steven Globerman, Mike W. Peng & Daniel M. Shapiro, *Corporate Governance and Asian Companies*, 28 ASIA PAC. J. MGMT. 1 (2011).

owners of a corporation's residual interests, are but one of many entities served by a corporation, and (2) corporate governance issues must be expanded to all stakeholders of a company (workers, creditors, and the environment). The passage of Law 2011-103 of January 27, 2011 on Equal Representation of Women and Men on Corporate Boards and on Equality in the Workplace, also known as the French Corporate Board Quota (FCBQ), has prompted changes in the composition of current corporate boards and a transformation in French corporate governance.<sup>2</sup> France adopted the FCBQ after Norway passed a similar law in 2008.<sup>3</sup> After the FCBQ, other European countries and regional institutions have begun viewing quotas as a legitimate and even necessary remedy, although their implementation has been far from homogeneous. This corporate governance culture stands in sharp contrast with the shareholder governance found in the United States. Feminization, in the literal sense of adding women participants to corporate leadership, augments the variety of perspectives. It suggests that effective corporate governance relies on all stakeholders' interests, rather than merely shareholders' interest.

This Article explores whether the addition of women board members does in fact "feminize" the corporation.. Professor Rosenblum's work explores the effect of women's presence on board governance more

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<sup>2</sup> Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle [Law 2011-103 of January 27, 2011 on Equal Representation of Women and Men on Corporate Boards and on Equality in the Workplace], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 28, 2011, p. 1680.

<sup>3</sup> AAGOTH STORVIK & MARI TEIGEN, FRIEDRICH-EBERT-STIFTUNG, WOMEN ON BOARD: THE NORWEGIAN EXPERIENCE 1, 4 (2010), available at <http://library.fes.de/pdf-files/id/ipa/07309.pdf>; Press Release, Regjeringen Stoltenberg II, Rules Regarding Gender Balance Within Boards of Public Limited Companies (Aug. 12, 2005), available at <http://www.regjeringen.no/nb/dep/bld/pressesenter/pressemeldinger/2005/rules-regarding-gender-balance-within-bo.html?id=429993>. Section 6-11a of Norway's Companies Act reads:

On the board of directors of public limited liabilities companies, both sexes shall be represented in the following manner:

1. If the board of directors has two or three members, both sexes shall be represented.
2. If the board of directors has four or five members, each sex shall be represented by at least two.
3. If the board of directors has six to eight members, each sex shall be represented by at least three.
4. If the board of directors has nine members, each sex shall be represented by at least four, and if the board of directors has more members, each sex shall be represented by at least 40 percent.
5. The rules in no. 1 to 4 apply correspondingly for elections of deputy directors.

Lov om allmennaksjeselskaper [Public Limited Liability Companies Act] 19 des 2003 nr. 120, § 6-11a (Nor.), translated in *Norwegian Public Limited Liability Companies Act*, SCHJØDT (Feb. 26, 2009).

specifically.<sup>4</sup> This Article takes a broader view to comprehend the difference between Europe and the United States by presenting the constitutional and corporate governance backgrounds of each system. Further, the Article exposes some of the limits of the convergentist corporate governance theory. Some scholars, notably Henry Hansmann and Reinier Kraakman, have argued that national corporate governance mechanisms are on an inexorable path toward convergence, leading to the “end of history” for corporate law in which differences between nations eventually fade away.<sup>5</sup> This Article demonstrates that some divergence has taken place across the Atlantic with regard to the shareholder/stakeholder divide, a divergence exacerbated by the adoption of corporate board quotas in France, Norway, and elsewhere.

France’s recently adopted quota for women on corporate boards will likely alter French and perhaps European corporate governance.<sup>6</sup> The quota will arguably lead to significantly more women-inclusive corporate boards, reflecting an unarticulated supposition that the corporate board is an appropriate site for regulating a social justice question such as sex equality. This change accentuates the established stakeholder corporate culture widespread in Europe, as evidenced by the presence of worker representation on boards. In contrast, the United States remains firmly oriented towards shareholder primacy. Recently, stock exchange, capital market, and corporate governance reforms have, to a considerable degree,

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<sup>4</sup> See Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55 (2009). In retrospect, to some extent that article somewhat naively advocated for the institution of quotas to improve women’s representation on corporate boards. Forthcoming work will examine the impact of corporate board quotas on corporate governance itself. See Darren Rosenblum & Daria Roithmayr, *Sex Regimes and Corporate Governance* (forthcoming).

<sup>5</sup> Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law* 3 (Harvard Law Sch., Discussion Paper No. 280, 2000), available at [http://www.law.harvard.edu/programs/corp\\_gov/papers/No280.00.Hansmann-Kraakman.pdf](http://www.law.harvard.edu/programs/corp_gov/papers/No280.00.Hansmann-Kraakman.pdf) (“[A]t the beginning of the twenty-first century we are witnessing rapid convergence on the standard shareholder-oriented model as a normative view of corporate structure and governance, and we should expect this normative convergence to produce substantial convergence as well in the practices of corporate governance and in corporate law.”).

<sup>6</sup> Representation of women on corporate boards varies widely by country. See generally Julia J. Redenius-Hoevermann & Daniela Weber-Rey, *La représentation des femmes dans les conseils d’administration et de surveillance en France et en Allemagne*, 4 REVUE DES SOCIÉTÉS 203, 203–04 (2011). Important cultural factors explain this European disparity. In Germany, where women traditionally have a weaker presence in professional environments, the idea of introducing quotas today seems unrealistic. Moreover, this idea has been rejected by the German legislature, which has contented itself with incorporating the concept into the Corporate Governance Code. For a precise and comprehensive study, see *id.* In Europe today, barely one in six board members are female, with women representing only 4% of board chairpersons. This average conceals great disparities in cultural traditions among Member States. See *Gender Balance in Decision-Making Positions*, EUR. COMM’N, <http://ec.europa.eu/justice/gender-equality/gender-decision-making> (last visited May 10, 2014) (“On 14 November 2012 the European Commission proposed legislation with the aim of attaining a 40% objective of the under-represented sex in non-executive board-member positions in publicly listed companies, with the exception of small and medium enterprises. The aim of this new legislation is to accelerate progress towards a better gender balance on the corporate boards of European companies.”).

been driven by the financial crisis and have made the European stakeholder approaches more common and popular. Even if not intended as such, the FCBQ is part of this evolution.

Each part of the Article contrasts both national and regional developments to depict the widening discrepancy between United States and European corporate governance cultures. Part II briefly details the proliferation of quotas for women on corporate boards in the national and transnational European contexts. It also frames the shift in France and the resistance in the United States within their respective constitutional traditions. Part III explores the depth of the stakeholder/shareholder divide between those two societies, which are governed by vastly distinct public and private regimes. Part IV explores the distinction between stakeholder or shareholder orientations of corporate governance in France and the United States. For example, France has a long history of practical stakeholder participation. The United States' interest in stakeholder inclusion, in contrast, has remained an academic exercise. Finally, Part V argues that FCBQs, both at the national and the European Union level, will strengthen the stakeholder orientation of European corporations and deepen the divide between European and United States corporate governance.

A comparative project such as this poses several challenges. Beyond the question of translation sits the incorporation of diverse legal literatures across societies, including constitutional and corporate law frameworks.<sup>7</sup> Describing and comparing two distinct legal cultures, each of which has its own multiplicities,<sup>8</sup> raises particular comparative challenges that require a better understanding of each legal system.<sup>9</sup> To meet those challenges, this study employs three distinct comparative methods: functionalism, contextualism, and discourse comparativism.<sup>10</sup> It is a functionalist study in

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<sup>7</sup> See Catherine A. Rogers, *Gulliver's Troubled Travels, or the Conundrum of Comparative Law*, 67 GEO. WASH. L. REV. 149, 150–51 (1998) (citing UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 97 (1997)); William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1965 (1995); Basil Markesinis, *Comparative Law—A Subject in Search of an Audience*, 53 MOD. L. REV. 1, 21 (1990); Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 222 (1999); see also Paula Giliker, Book Review, 55 INT'L & COMP. L.Q. 243, 243 (2006) (reviewing ESIN ÖRÜCÜ, *THE ENIGMA OF COMPARATIVE LAW: VARIATIONS ON A THEME FOR THE TWENTY-FIRST CENTURY AND METHODOLOGY OF COMPARATIVE LAW* (2005)).

<sup>8</sup> Although France's corporate governance is unitary, U.S. and European corporate governance regulation have many parts that move in different ways. For example, Delaware law and the Securities and Exchange Commission dominate in the United States. Federalism is one form of multiplicity; others include language, legal pluralism, conflicting or coterminous court systems, and other differences that reflect the law's complexity.

<sup>9</sup> See Riles, *supra* note 7, at 222; see also Giliker, *supra* note 7, at 243 (Örücü discusses the difficulties that academics and students encounter in undertaking comparative research). Comparative law provides "a glimpse into the origins of legal norms; the prospect of a better understanding of the efficacy and limits of law; and the hope of insight into the connections among law, behavior, ideas, and power." Riles, *supra* note 7, at 238.

<sup>10</sup> Here, we rely largely on Annelise Riles's categorization of the field, which provides both a

that it will describe the FCBQ's impact and social function.<sup>11</sup> At the same time, the study is contextual because it incorporates the law and its relationship to culture, as well as interdisciplinary knowledge.<sup>12</sup> These explicit comparisons render each system more coherent than it would appear otherwise.<sup>13</sup> Finally, the study uses comparative method to clarify the cultural divide separating the United States and European corporate governance.

## II. MIXITÉ VERSUS DIVERSITY: CONSTITUTIONAL FRAMINGS

France's constitutional framework, which allowed the FCBQ, stands in stark contrast to that of the United States, which would not permit quotas.

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methodological and cultural distinction among these groups, recognizing the role that subjectivity plays in scholarly production. Riles, *supra* note 7, at 231–51. Fabio Morosini categorizes the methods of comparative law analysis in a different way, arguing that two different schools exist. The first, which takes a convergence approach, focuses on the similarities between two or more legal systems. Fabio Morosini, *Globalization & Law: Beyond Traditional Methodology of Comparative Legal Studies and an Example from Private International Law*, 13 CARDOZO J. INT'L & COMP. L. 541, 545 (2005). The second, non-convergence approach, distinguishes different legal systems by looking at the differences between two or more legal systems. *Id.* at 546; *see also* Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631, 665, 705 (2005) (arguing that comparatists refer to other legal studies of the law not because they do not know other methodologies, but because they do not want to know: "the desire not to know about otherness-in-the-law is not simple ignorance; rather, it assumes a prescience of what it is that one does not want to know . . .").

<sup>11</sup> Riles, *supra* note 7, at 232, 235; Morosini, *supra* note 10, at 546 (noting that some scholars argue for a comparative methodology based on the differences in the laws of countries, known as the non-convergence approach). As a defining comparative school, functionalists are accused by other comparativists of Eurocentrism and inappropriately loose comparisons. *See* Riles, *supra* note 7, at 232, 241.

<sup>12</sup> Riles, *supra* note 7, at 240–41; *see also* Horst Klaus Lücke, *Statutory Interpretation: New Comparative Dimensions*, 54 INT'L & COMP. L.Q. 1023, 1026 (2005) (reviewing STEFAN VOGENAUER, *INTERPRETATION OF STATUTES IN ENGLAND AND ON THE CONTINENT: A COMPARATIVE STUDY OF JUDICIAL JURISPRUDENCE AND ITS HISTORICAL FOUNDATIONS* (2001)) (attempting to explain the difference between interpretations of the law in different countries, particularly in common law and civil law courts; Lücke utilizes culture to explain the divergence in interpretive methods). *See generally* Günther Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985) (Frankenberg argued early on that a critical focus was imperative for methodologically sound comparative work). Literary theory and cultural studies provide insight into a legal text's underlying meaning. *Id.*

<sup>13</sup> Discourse scholars, in inquiring about their own legal traditions, address their subjectivity explicitly, in part to achieve more accuracy in the description of the "other" legal system. The concept of otherness, typically arising in critical theory with regard to group difference, also arises in the comparative law context. *See* Morosini, *supra* note 10, at 547. This is in contrast to functionalist work. Discourse scholars criticize functionalist work for ignoring their subjectivity. Descriptions of other legal cultures may consist of the scholar's projection of her own perceptions onto the ostensible territory of study. In this "epistemological imperialism," the study better reflects the values of the observer rather than the observed. Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 190 (2002).

## A. France's Corporate Board Quota and Its Impact

### 1. A Rigorous Quota

On January 27, 2011, France's legislature changed the French corporate landscape by passing Law 2011-103 on the equal representation of men and women on boards of directors and supervisory boards.<sup>14</sup> This law established the principle that boards of directors and supervisory boards of private companies or joint-stock companies of any size, listed and unlisted, must strive for an equal representation of men and women.<sup>15</sup>

The legislature distinguished between private corporations and public sector businesses and established minimum percentages to be met and a schedule for attaining these objectives. Three main categories of corporations face regulation: (1) private companies and joint-stock companies that issue shares admitted for trading on a regulated market; (2) French corporations that, for three consecutive fiscal years, satisfy certain criteria (employing at least 500 permanent staff members and producing an annual revenue or balance sheet total of at least €50 million); and (3) public institutions and certain businesses that are subject to the democratization rules of the public sector. The law itself defines the aims of its legal framework, as well as the "broad outline" of gender equality policy. It stipulates sanctions for companies that fail to respect the aims or broad outline imposed. Further disclosure requirements would be superfluous.<sup>16</sup>

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<sup>14</sup> See François Roche, *Conseils d'administration: les femmes investissent le CAC 40*, LA TRIBUNE (July 11, 2011), <http://www.latribune.fr/actualites/economie/france/20110715trib000636534/conseils-d-administration-les-femmes-investissent-le-cac-40.html>; see also Benoit Marpeau, La quasi-parité imposée au sein des conseils d'administration, LE CERCLE LES ECHOS (Feb. 21, 2011), <http://lecercle.lesechos.fr/cercle-entrepreneur/juridique/221133475/quasi-parite-imposee-sein-conseils-dadministration>.

<sup>15</sup> CODE DE COMMERCE [C. COM.] arts. L225-17, L225-69, L226-4 (Fr.).

<sup>16</sup> These provisions are completed by the operation of the "comply or explain" rule via the recommendations of the AFEP-MEDEF Code. Soft codification was introduced in France in the 1990s, driven by increasing globalization in the market capitalization of the major listed companies, and thus in response to the expectations of overseas investors. Consequently, the principles of corporate governance were first introduced in France at the instigation of capital markets and it is manifestly in this area that the issues of soft law and self regulation have been most strongly at work over the last twenty years. The stages in this process to formulate flexible corporate law are well known. First, there was the July 1995 CNPF-AFEP report on the boards of directors of listed companies (Viénot I Report). Then came the December 1998 report on corporate governance (Viénot II Report), followed by the October 2003 AFEP-MEDEF report on the corporate governance of listed companies (Bouton Report). All of these reports were consolidated, at the instigation of Parliament, into a "Code of Corporate Governance for Listed Companies" by December 2008. See *infra* note 17. Strictly speaking, this code falls under the heading of soft law, insofar as companies may choose whether or not to adopt it. The "comply or explain" rule requires only that companies choosing the latter option explain their reasons for not adopting the rules of good corporate governance proposed in the Code of Corporate Governance. The AFEP-MEDEF Code is a private code of corporate governance, and it is the one most



Since 1995, several business groups have produced effective corporate governance codes to which listed companies may voluntarily refer. These include Viénot Reports I and II, the Bouton Report, and the AFEP-MEDEF Report.<sup>17</sup> Now the code of reference for companies issuing shares admitted to trading on a regulated market, the AFEP-MEDEF Code does not bind corporations. However, European Community law obligates the chair of the board of directors (or supervisory board) to prepare a report on corporate governance, including whether the firm complies with the AFEP-MEDEF Code.<sup>18</sup> Non-compliance requires explanation. The French Financial Markets Authority (AMF) then publishes an annual report that includes firms' internal monitoring procedures. The Code applies to listed firms but recommends that others adopt the rules as well. In April 2010, the Code set certain parity objectives to be achieved progressively for women on boards of at least twenty percent female directors within three years and at least forty percent within six years. The AFEP-MEDEF Code may also apply to companies outside the FCBQ's scope.<sup>19</sup>

Before the FCBQ bill's presentation in 2009, only ten percent of the directors of French listed companies were female, and only five percent of new board members were women.<sup>20</sup> At that point, only four publicly listed companies had reached the twenty-percent threshold.<sup>21</sup> When the bill was

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French listed companies refer to. The AFEP-MEDEF Code was drafted by the "Association française des entreprises privées" (AFEP) and the "Mouvement des entreprises françaises" (MEDEF), the two leading professional associations for private companies in France.

<sup>17</sup> All of these reports were combined in a code, the Code of Corporate Governance for Listing Companies. See *Code de gouvernement d'entreprise des sociétés cotées*, AFEP (June 2013), available at [http://www.afep.com/uploads/medias/documents/Code\\_gouvernement\\_entreprise\\_societes\\_cotees\\_sJuin\\_2013.pdf](http://www.afep.com/uploads/medias/documents/Code_gouvernement_entreprise_societes_cotees_sJuin_2013.pdf).

<sup>18</sup> See Council Regulation 384/96, of 22 December 1995 Protection Against Dumped Imports from Countries not Members of the European Community, 1995 O.J. (L 213); Commission Decision 2008/649/EC, of 3 July 2008 regarding Council Regulation 384/96 of 22 December 1995 on Protection Against Dumped Imports from Countries not Members of the European Community, arts. 8–9, 2008 O.J. (L 213); Directive 2006/46/EC, of the European Parliament and of the Council of 14 June 2006 amending Council Directive 78/660/EEC on the Annual Accounts of Certain Types of Companies 83/349/EEC on Consolidated Accounts, 86/635/EEC on the Annual Accounts and Consolidated Accounts of Banks and Other Financial Institutions and 91/674/EEC on the Annual Accounts and Consolidated Accounts of Insurance Undertakings, art. 46a, 2006 O.J. (L 224) 1, 4 (requiring companies that have securities trading in a market defined by Article 4(1) of Directive 2004/39/EC to provide a corporate governance report).

<sup>19</sup> Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle [Law 2011-103 of January 27, 2011 for the Equal Representation of Men and Women on Boards of Directors and Supervisory Boards, and for Professional Equality], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 28, 2011, p. 1680.

<sup>20</sup> See Roche, *supra* note 14; Institut Français des Administrateurs, *Journée annuelle des administrateurs 2010: les nouvelles dynamiques du conseil*, 21 ADMINISTRATEUR: LA LETTRE DE L'IFA 1, 3 (2010); Veronique Morali, *Les femmes dans les conseils d'administration*, in LA GOUVERNANCE DES ENTREPRISES, CLÉ DE LA COMPÉTIVITÉ 24 n.409 (2011).

<sup>21</sup> Institut Français des Administrateurs, *supra* note 20.

introduced, nominations from general meetings in 2010 doubled this percentage: almost a third of new directors were women, and thirty percent of CAC 40<sup>22</sup> companies had reached the FCBQ's twenty percent intermediate level.<sup>23</sup> In absolute terms, the number of female directors has risen from 60 to 119 in two years.<sup>24</sup> This percentage remains low, however, for SBF80 companies, where only fifteen percent of directors are women.<sup>25</sup> The spike in the number of women on corporate boards after the public discussion and eventual adoption of the FCBQ suggests that the bill's introduction played a key role in this change. Thus, a certain correlation may be inferred between the intervention of the legislature and the recent improvement seen in CAC 40 corporations in terms of gender equality.<sup>26</sup>

Studies regarding the profile of female directors in France at the time of the quota's adoption show that female directors are generally younger than their male colleagues (54.7 years old on average compared to 60.7 for men) and more likely to have international origins.<sup>27</sup> That being said, this profile is shifting as many corporations take on new women directors— anecdotal evidence confirms this shift.<sup>28</sup> Many new female directors hold degrees in law or business management in contrast to the more technical education received by their male counterparts. Male directors are most often graduates of the French *Grandes Écoles*. Female directors also do not have the same experience at the top executive levels as male directors.<sup>29</sup> One may therefore infer a correlation between the feminization of boards of directors and some diversification of skills and points of view on how to run a business. In practical terms, the participation of women on boards of directors should offer corporations a larger pool of skills and expertise than a pool composed exclusively of males. A counterargument might assert that less executive experience may not constitute useful diverse experience.<sup>30</sup> However, given the extraordinarily narrow band of French

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<sup>22</sup> The CAC 40 is one of the main indices for listed companies, along with the SBF 120 and the SBF 80.

<sup>23</sup> Institut Français des Administrateurs, *supra* note 20, at 1, 3.

<sup>24</sup> Roche, *supra* note 14.

<sup>25</sup> *Id.* at 24.

<sup>26</sup> *Id.*

<sup>27</sup> OBSERVATOIRE DE LA RESPONSABILITÉ SOCIÉTALE DES ENTREPRISES, L'ACCES ET LA REPRESENTATIVITE DES FEMMES AUX ORGANES DE GOUVERNANCE D'ENTREPRISE (Sept. 2009), *available at* [http://www.orse.org/l\\_acces\\_et\\_la\\_representativite\\_des\\_femmes\\_aux\\_organes\\_de\\_gouvernance\\_d\\_entreprise-52-8.html](http://www.orse.org/l_acces_et_la_representativite_des_femmes_aux_organes_de_gouvernance_d_entreprise-52-8.html).

<sup>28</sup> Valérie Lion, *Conseils d'administration: ces femmes qui cumulent*, L'EXPRESS, May 16, 2012, at 74.

<sup>29</sup> Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 294 (2009).

<sup>30</sup> Indeed, one study on the lower experience among women on boards in Norway after their adoption of a corporate board quota correlates this with lower returns on equity. *See generally* Kenneth R. Ahern and Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of*

society that occupies corporate board positions, diversification may bring new market knowledge.<sup>31</sup>

## 2. *Was the FCBQ the Right Way to Impose Quotas in Boardrooms?*

Despite these advances, the law has not escaped controversy. Experts have notably raised three issues. First, the gradual implementation of the law is not easy to interpret, and the interpretation has raised considerable debate.<sup>32</sup> Second, the sanction of suspending directors' fees, which is generally the response to absenteeism or misconduct, is not well suited for violations of a legal rule on quotas.<sup>33</sup> Third, there are concerns that the aims of the law may not be attainable. Admittedly, the law's restrictive requirements may lead to a mechanical application, to the point of adhering to quotas to the detriment of skills. Indeed, reliable estimates suggest that the demand for new female directors is close to one thousand.<sup>34</sup> The targets will be even harder to reach if authorities implement a proposal to reduce the number of concurrently held mandates to less than five.

Furthermore, the violation of the quota, which some anticipate to be particularly problematic in the case of smaller businesses, and the double punishment that would follow, raises the fear that it may increase the liability of directors in the future.<sup>35</sup> Although strong feminization of higher education may facilitate filling these positions over the long term, the consistent exclusion of women from executive positions will continue to make it difficult to fill the directorships in the near term. In addition, reducing the number of concurrently held mandates would logically lead to greater diversity in the supply of directors. Unless they also come to hold several directorships,<sup>36</sup> the naming of more female directors may well lead

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*Mandated Female Board Representation*, 127 Q. J. ECON. 137 (2012).

<sup>31</sup> Of course, the presumption here is that diversity does lead to value, an assertion that requires further demonstration. Scott Page's work on diversity provides substantial material on the productivity of diversity. See generally SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007).

<sup>32</sup> See generally ASSOCIATION NATIONALE DES SOCIÉTÉS PAR ACTIONS, *JOURNÉE D'ÉTUDE DE L'ANSA* (2011).

<sup>33</sup> The law establishes two types of sanctions: (1) the nullification of nominations made in violation of gender equality rules, and (2) for private listed and large companies only, the more original but not necessarily effective measure of suspending directors' fees for all directors concerned, where the law has been violated. CODE DE COMMERCE [C. COM.] arts. L225-45, L225-83 (Fr.). For a critique, see Jean-François Barbiéri, *Parité sexuelle obligatoire dans la composition des conseils: le problème des sanctions*, 5 JOLY MENSUAL D'INFORMATION DES SOCIÉTÉS 508, 508 (2010); Chantal Jordan, *Vers une représentation équilibrée dans les conseils d'administration et de surveillance*, REVUE LAMY DROIT DES AFFAIRES, May 2011, at 3462.

<sup>34</sup> Morali, *supra* note 20, at 24.

<sup>35</sup> *Id.*

<sup>36</sup> Only two female directors hold at least three directorships concurrently.

to greater support for a strict rule concerning the concurrent holding of mandates. Whether or not multiple directorships affect efficacy is an open question, but it is clear that board-nominating committees prefer candidates who can focus on their particular corporate context.

## B. The Comparative Ease of French Constitutional Modification

French legal culture permitted the FCBQ's adoption. France permits the revision of its Constitution through simple legislative approval, unlike the United States, which requires a legislative supermajority followed by a supermajority in each of the legislatures of a supermajority of states. The contrast is marked—the United States Constitution remains a largely 18th century document,<sup>37</sup> while France's Constitution changes on a regular basis. The distinct approaches to constitutional reform reflect an equally profound contrast between the centrality of jurisprudence in common law jurisdictions and legislation in civil law jurisdictions. Federalism also plays a role—the relevant jurisdiction for the adoption of such corporate regulation in the United States would be Delaware, where a majority of the country's largest corporations are registered, or in federal securities law.<sup>38</sup> The adoption of a CBQ in Delaware would raise both state and federal constitutional questions with surely unpromising results.<sup>39</sup>

The most direct precedent for the FCBQ is the passage of Parity in 2000.<sup>40</sup> Parity required that political parties name women as half of all candidates for public office. This occurred as the result of a long movement for women's suffrage and electoral equality.<sup>41</sup> After a series of feminist movements related to the right to vote and political representation,<sup>42</sup> a second movement to institute some quotas starting after the Socialist Party victory of 1981 obtained limited success. However, the

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<sup>37</sup> A point most eloquently made by Hannah Arendt. See HANNAH ARENDT, *ON REVOLUTION* 202 (1963) ("Thus the amendments to the Constitution augment and increase the original foundations of the American republic.").

<sup>38</sup> Barbara Black, *Protecting the Retail Investor in an Age of Financial Uncertainty*, 42 U. DAYTON L. REV. 61, 77–78 (2009).

<sup>39</sup> Although France has some regions, the law is uniform throughout the country, and most European states are not federal.

<sup>40</sup> See JOAN WALLACH SCOTT, *PARITE!: SEXUAL EQUALITY AND THE CRISIS OF FRENCH UNIVERSALISM* (2005); Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119 (2005).

<sup>41</sup> See Rosenblum, *supra* note 40; SCOTT, *supra* note 40.

<sup>42</sup> Despite ceaseless efforts to attain suffrage, French men represented women in their household for sixty years after Auclert's declaration, far longer than in most other democracies. See FRANÇOISE GASPARD ET AL., *AU POUVOIR, CITOYENNES! LIBERTÉ, ÉGALITÉ, PARITÉ!* 102 (1992). During the First World War, one politician proposed unsuccessfully that widows should vote because the men through whom they were represented could no longer do so. *Id.* at 103–04. It was only after Vichy's collapse in 1944 that French women obtained the vote, well after the Nineteenth Amendment's passage in the United States. *Id.* at 21.

Conseil Constitutionnel—the French equivalent to the U.S. Supreme Court—later struck down the legislation.<sup>43</sup> Parity advocates reshaped their agenda around the notion of a gendered vision of humanity, composed of two sexes, in order to address these constitutional concerns.<sup>44</sup> Confronting potential victory, Parity advocates began to consider the concerns in the Conseil Constitutionnel's 1982 decision, shifting their focus from guaranteeing legislative seats to requiring parties to guarantee half their candidacies.<sup>45</sup>

During the 1990s, Parity advocates built on historical, political, and philosophical arguments for women's representation.<sup>46</sup> Imposing quotas on political parties rather than the legislature itself would permit voters to express their political ideology and increase women's participation.<sup>47</sup> Françoise Gaspard and a broad movement of left-identified feminists successfully reframed the debate, ultimately allowing Parity to become law in 2000.<sup>48</sup> Additionally, Parity was seen as a cure for a crisis of

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<sup>43</sup> This version was overturned by the Conseil Constitutionnel in a 1982 ruling. The Conseil Constitutionnel favors the notion of formal equality over equality of chances with the law. Decision 34, *Feminine Quotas*, denied the proposed amendment to modify election rules requiring at least 25% of the candidates on the list to be women. The Conseil believed that a "text that reserved a certain number of places for women . . . without doing the same for men . . . would be contrary to the principle of equality." Conseil constitutionnel [CC] [Constitutional Court] décision No. 82-146, Nov. 18, 1982 (Fr.). However, voluntary commitments to women's representation arose among left-wing political parties throughout the 1980s. As a strategic move, in 1975 Françoise Giroud, Secretary for Women's Condition, introduced 100 measures for women, including a bill limiting the candidates on a list to 80% for either of the two sexes. Original language reserved 20% for women, but this language was removed at the advice of attorneys concerned about such a quota. Four years later, the Minister for Family and Women's Conditions proposed a 20% minimum for towns with populations above 2,500. GILL ALLWOOD & KHURSHEED WADIA, *WOMEN AND POLITICS IN FRANCE 1958-2000* 192 (2000); GASPARD ET AL., *supra* note 42, at 136–37. Although the Assembly approved the bill, the session ended before the Senate could debate it.

<sup>44</sup> See Rosenblum, *supra* note 40; SCOTT, *supra* note 40.

<sup>45</sup> See Rosenblum, *supra* note 40.

<sup>46</sup> Parity advocates claimed that women were being subjected to the rule of men: "The monopolization of power by a group, by a clique, as well as by a sex is a usurpation." GASPARD ET AL., *supra* note 42, at 181. Another important point was Mariette Sineau's critique of France's "Monosexual Democracy." The "maleness" of the political class, Parity advocates argued, constituted a "monosexual" democracy in which men acquire political power early in their lives, often based on social position and family. See MARIETTE SINEAU, *PROFESSION FEMME POLITIQUE: SEXE ET POUVOIR SOUS LA CINQUIÈME RÉPUBLIQUE* 240 (2001).

<sup>47</sup> ALLWOOD & WADIA, *supra* note 43, at 211.

<sup>48</sup> GASPARD ET AL., *supra* note 42. In the early 1990s, Parity began to gain momentum. See Isabelle Giraud & Jane Jenson, *Constitutionalizing Equal Access: High Hopes, Dashed Hopes?*, in HAS LIBERALISM FAILED WOMEN? ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES 73 (Sytté Klausen & Charles S. Maier eds., 2001). In March 1992, a roundtable meeting was organized to serve as a "network for Parity." CLAUDE DE GRANRUT, *ALLEZ LES FEMMES!: LA PARITÉ EN POLITIQUE* 34 (2002). Months later, in *Au Pouvoir, Citoyennes! (To Power, Women Citizens!)*, Françoise Gaspard argued that the Revolution, the suffrage movement, and the postwar period all failed to address the issue of outcome-based women's participation in elected bodies. See GASPARD ET AL., *supra* note 42. *Le Monde's* publication of the "Manifesto of 577 for Paritary Democracy" placed Parity on the national stage, winning the endorsement of the left and the continued inattention of the right,

democracy—a method to legitimize the state.<sup>49</sup> The final version of the law amended the Constitution of the Fifth Republic of 1958 and provided for legislation that would implement the constitutional changes.<sup>50</sup> Parity's implementation has been met with marked success in some elections and more modest advances in others. It continues to be the subject of much debate.<sup>51</sup>

Like Parity, the FCBQ was initially deemed unconstitutional, and the constitutional prohibition was overcome by legislative action. In both cases, the objective of sex equality played a central role. It is worth noting, however, that the FCBQ originated from a conservative government, whereas Parity arose out of a progressive bloc. This fact proves surprising for those who view the measure as a feminist move. It is a view rarely taken by political conservatives. However, the utilitarian business justification of the law reflects its conservative origins.

The constitutional framework in France allowed for a constitutional legitimacy for *mixité*, or the inclusion of people of both sexes. Preceding the publication of the FCBQ, many scholars debated constitutional issues and some argued that a law introducing quotas was prohibited because the constitutional principle of Republican equality prohibits positive discrimination.<sup>52</sup> In addition, under French traditional jurisprudence, the prohibition of quotas was specifically applied to private companies. The Conseil Constitutionnel decided that “the Constitution does not allow that

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apart from Simone Veil. Legislators proposed a version of progressive but non-mandatory Parity. Leading male politicians came out in favor of Parity, including two candidates in the 1995 Presidential race. See generally ÉLÉONORE LÉPINARD, *L'ÉGALITÉ INTROUVABLE: LA PARITÉ, LES FÉMINISTES ET LA RÉPUBLIQUE* (2007).

<sup>49</sup> Rosenblum, *supra* note 40; ALLWOOD & WADIA, *supra* note 43, at 213 (“The main indicators of this crisis included the growing gap between the concerns of the French people and the political elite, repeatedly demonstrated by public opinion polls; rising abstention rates; the failure of the parties to recruit new members; and public disaffection with a political class in which scandals seemed endemic.”); SINEAU, *supra* note 46, at 246 (“The debate on Parity only served to restart the question of the renewal of democracy by women.”).

<sup>50</sup> The constitutional revision took place in 1999. Law Number 99–569 of July 8, 1999 modified Articles 1 through 4 of the Constitution of October 4, 1958. Title I of Law Number 2000–493 of June 6, 2000 basically requires that in France’s semi-proportional system, municipal, regional, European, and some senatorial elections use party slates, while others, notably National Assembly elections, require voters to select a particular candidate. In a list-proportional election, instituting Parity appeared relatively simple—every other name had to correspond to the “other” sex. Should a party fail to present candidates of alternating gender, the prefecture would refuse to present the list on the ballot. Parties were required to name women to half their candidacies or lose the ability to field any candidates at all. See generally LÉPINARD, *supra* note 48.

<sup>51</sup> For an authoritative discussion of Parity, see LÉPINARD, *supra* note 48. It is worthwhile to contrast this work with one executed at the time of Parity’s passage. See JANINE MOSSUZ-LAVAU, *Femmes et pouvoir en Europe méridionale en l’an 2000*, in *RAPPORT NATIONAL FRANÇAIS 43* (2000) (noting elections by list where three or fewer candidates appear to also avoid Parity rules).

<sup>52</sup> Anne-Marie Le Pourhiet, *Pour une analyse critique de la discrimination positive*, 114 *LE DÉBAT* 166 (2001).

the composition of directory or supervisory boards in private and public companies should be regulated by strict rules based on sex quotas.”<sup>53</sup> This decision was interpreted as rejecting quotas as a whole and, specifically, on boards of directors. Accordingly, the Constitution had to be amended before the FCBQ was passed. The amendment, Law 2008-724 of July 23, 2008, modified Article 1 of the French Constitution.<sup>54</sup> According to the new constitutional rule, “the law favors the equal access to elective mandates and positions for women and men, as well as to professional and social responsibilities.”<sup>55</sup> Thus, the new constitutional law made quotas possible in two main sectors: politics and management. Amending the Constitution to accommodate corporate board quotas highlights the relative fluidity of the French Constitution.

### C. U.S. Constitutional Jurisprudence Has Rejected Quotas

While French constitutional law now permits a focus on *mixité*, thus far it rejects any recognition of broader diversity in legal remedies for inequality. Beyond the common law–civil law divide, quotas underscore a particularly interesting contrast between the French and U.S. constitutional frameworks. In the United States, courts have consistently rejected quotas, as have thinkers across the ideological spectrum.<sup>56</sup> Even supporters of affirmative action have distinguished incremental affirmative action programs from quotas, which have been characterized as malignant, unjustifiable, and inherently wrong.<sup>57</sup> Although affirmative action may be called a quota in other contexts, quotas, at least those labeled as such, are pariahs.

#### 1. Quotas Examined Through the U.S. Constitutional Process

The U.S. Supreme Court has rejected quotas, even as it has affirmed the appropriate inclusion of discrete remedies for past discrimination. U.S. jurisprudence has rejected quotas specifically with regard to race-related affirmative action in higher education. The seminal case, *Regents of the*

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<sup>53</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 2006-533DC, Mar. 16, 2006, Rec. 39 (Fr.). See also Julie Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT’L J. CONST. L. 449 (2012).

<sup>54</sup> Loi 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République (1) [Law 2008-724 of July 23, 2008 on the Modernization of the Institutions of the Fifth Republic (1)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 23, 2008, p. 11890.

<sup>55</sup> *Id.*

<sup>56</sup> See Rosenblum, *supra* note 40, at 1133–36.

<sup>57</sup> Alex M. Johnson, Jr., *Symposium on Race Consciousness and Legal Scholarship: Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1067 (1992).

*University of California v. Bakke*, differentiated affirmative action (which it held was permissible within specific confines) from a quota, which it ruled was impermissible.<sup>58</sup> In considering the legitimacy of a remedy, the U.S. Supreme Court applied strict scrutiny as it had in previous race cases. To survive this highest level of scrutiny, the law in question must involve a compelling governmental interest and be narrowly tailored to achieve that interest. Laws or regulations involving gender are examined under the lower, intermediate scrutiny standard. In *Bakke*, the Court considered a challenge to the University of California's special-admission program that reserved 16 out of 100 placements for minority students.<sup>59</sup> The Court found that the goal of assuring specified numerical representation of a specific group was facially invalid as a form of race discrimination.<sup>60</sup> It held that race can be a factor in making determinations but cannot be the sole factor in excluding a certain group.<sup>61</sup>

This same reasoning would apply in the gender context. Were a jurisdiction in the United States to adopt a law similar to the FCBQ, it would undoubtedly run afoul of the very principles articulated in *Bakke* that have remained controlling in subsequent affirmative action cases. In particular, like *Bakke*, a CBQ reserves spots for a specific group—it does not make gender one factor among many, but rather makes gender the only qualifying trait for compliance with the quota. If a federal court were to analyze a statute such as the CBQ, it would follow the intermediate scrutiny standard in which classifications must further a substantial governmental interest and be tailored to fit that interest. The court could not “rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>62</sup> As in *Bakke*, gender could be a factor among several in developing programs to benefit women, but a *numerical quota* that can be filled only by women would be prohibited. Subsequent case law has only further limited the application of affirmative action authorized in *Bakke*.<sup>63</sup> Advocates for such a quota would have to articulate the state interest in workplace diversity, but even under this standard, it would only apply to state-funded organizations. The

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<sup>58</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Donald T. Kramer, Annotation, *What Constitutes Reverse Sex or Gender Discrimination Against Males Violative of Federal Constitution or Statutes—Nonemployment Cases*, 166 A.L.R. FED. 1 (2000).

<sup>63</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (applying a strict scrutiny standard to decide whether the consideration of an applicant's race as part of the University of Michigan Law School's admissions process was constitutionally permissible and holding that consideration of race in the admission process is constitutional so long as it is used as one factor among many in an individualized process); see also *Gratz v. Bollinger*, 539 U.S. 244 (2003) (utilizing the strict scrutiny standard, the Court disallowed the University of Michigan's admissions policy in allotting points in the admission process to minorities on the sole basis of their minority classification).



alternative would be that such a quota would redress past discrimination, but the evidence would have to be extremely persuasive.

One of the most prominent ways in which the United States has addressed gender inequality is through Title IX, which prohibits sex discrimination in the education context.<sup>64</sup> Title IX requires institutions to ensure that university sports funding is substantially proportionate to the respective enrollments of male and female students. If one sex has been underrepresented, the program should effectively include the underrepresented sex. Although the U.S. Congress clearly did not intend Title IX to be a quota, closer examination of Title IX's provisions reveals its quota-like aspects, as it compares opportunities by gender and only allows limited disparities. Like the FCBQ and Parity, Title IX achieves adjustments in gender inequality with wide-ranging effects.

Despite Title IX's quota-like enforcement method, quota-phobia dominated the debate surrounding it. One sponsor asserted that, "we are striking down quotas. The thrust . . . is to do away with every quota."<sup>65</sup> As one critic alleged, "[A] system that requires a certain number of persons to be granted an opportunity based solely on one characteristic—such as sex—without regard for other qualifications—such as ability—is a 'quota system' in every sense of the words."<sup>66</sup> This antipathy towards quotas continues today, as it mirrors the fundamental reluctance to grapple with structural power differentials and group rights. Title IX's mechanism extended benefits based on the gender ratio of the student body, rather than

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<sup>64</sup> The statute states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2000). A relevant comparison to Title IX is Norway's CBQ and the French Parity law. See generally Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Inequality Remedies*, 76 *FORDHAM L. REV.* 2873 (2008). In contrast to both the CBQ and Parity, Title IX relies on the entirely distinct methodology of requiring substantial proportionality to reduce or eliminate gender-related harm in education. Congress passed Title IX in 1972 to extend the protections of the 1964 Civil Rights Act to federally funded educational institutions on the basis of sex. The statute states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2000). Title IX's first compliance option requires substantially proportionate opportunities, a standard that functions much like a quota. The U.S. Court of Appeals for the First Circuit affirmed the validity of the substantial proportionality test in *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993). Despite subsequent limitations, critics allege that substantial proportionality remains the only possible compliance option for many institutions. Title IX's proportionality requirement reflects an underlying redistributive response to gender inequality: the use of a quota system.

<sup>65</sup> Donald Mahoney, *Taking a Shot at the Tile: A Critical Review of Judicial and Administrative Interpretations of Title IX as Applied to Intercollegiate Athletic Programs*, 27 *CONN. L. REV.* 943, 946 (1995) (emphasis omitted) (quoting 117 *CONG. REC.* 30,409 (1971)).

<sup>66</sup> *Id.* at 944. Senator Daryl Beall noted that a gender quota could result in reverse discrimination against others: "As we eliminate [sex discrimination in education], I hope that we are not establishing still another form of bias." *Id.* at 948 (quoting 118 *CONG. REC.* 5813 (1972)).

that of the broader national population, in a way that seems designed to avoid appearances of a quota. At the time Title IX was passed, the majority of students were men,<sup>67</sup> and Congress's remedy aided women, but only in relation to their student body population.<sup>68</sup>

In addition, quotas arouse disdain from the political-right and political-left. A *laissez-faire* framework would view quotas as an intrusion into the private sector and a subversion of private interests.<sup>69</sup> One economic analysis, that of Gary Becker, would likely assert that, if it were more efficient to have women on boards, absent market failure, competitive corporations would already include them.<sup>70</sup> Liberal rejection of quotas may focus on several arguments, including that quotas violate the neutrality of constitutional doctrine,<sup>71</sup> according to which a benefit to a particular group would inappropriately disfavor others. Notably, "Classical democratic liberal theory was preoccupied enough with issues of extending equality that it rarely discussed difference."<sup>72</sup> The presumption is that, as a fundamental matter, no group should be treated any better than another group. The normative question is whether one group *should* benefit and

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<sup>67</sup> See Richard W. Riley, *Introduction*, U.S. DEP'T OF EDUC. (June 10, 1997), <http://www2.ed.gov/pubs/TitleIX/part1.html>; see also Iram Valentin, *Title IX: A Brief History*, 2 HOLY CROSS J.L. & PUB. POL'Y 123, 130 (1997).

<sup>68</sup> See Rosenblum, *supra* note 64, at 2883.

<sup>69</sup> Here, we presume what a law and economics scholar would find, given that there are no direct commentaries as of yet on corporate board quotas. The three central precepts of law and economics theory are rational choice, wealth maximization or efficiency, and faith in markets. Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303, 308–15 (2005). Richard Posner declares that a "man is a rational maximizer of his ends in life." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (6th ed. 2003). Furthermore, "The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money—in other words, that is registered in a market." Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979). Thus, it is the existence of a market that creates a venue to make efficiency or wealth maximization possible. Accordingly, for the law and economics traditionalist, gender quotas would undermine the market, the system of wealth maximization, and the framework by which men rationally maximize their own interests in life.

<sup>70</sup> See generally GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971).

<sup>71</sup> Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992). "Neutrality," as predominantly defined, is believed to be of natural origin and therefore just. *Id.* Sunstein, however, finds this "baseline" belief incorrect because the notion of what is neutral is instead a culmination of old biases and stereotypes. *Id.* at 3–4. The notion of "equality" cannot be detached from references to old values and distributions because the concept is dependent upon how the government normally ensures "equality" rather than how it should be accomplished. *Id.* at 6–9. Sunstein argues that the baseline for determining what is neutral arises from what is considered "natural," and what is natural originates in what the government normally does. In order to make change, the baseline of neutrality, in a constitutional context, must be adjusted through a substantive debate that is not reliant upon what is considered "natural." *Id.* at 13.

<sup>72</sup> Charles S. Maier & Sytte Klausen, *Introduction*, in *HAS LIBERALISM FAILED WOMEN? ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES* 3, 5, 19 (Sytte Klausen & Charles S. Maier eds., 2001).

whether such a benefit would necessarily disadvantage other groups.<sup>73</sup> Even if a nation determines that a particular group should benefit, how it makes this determination involves a different question. Another liberal concern is that ideas, rather than identity, should determine representation, reflecting “a general reluctance to mandate equality (or proportionality) of outcomes rather than alleged equality of opportunity.”<sup>74</sup>

Liberal and critical thinkers usually clash on a wide range of issues.<sup>75</sup> However, critical thinkers agree with liberals in rejecting quotas. They argue that no such thing as neutrality exists. Quotas further essentialist notions of identity, as there is an assumption that women are better equipped to represent women and that black representatives better represent black people.<sup>76</sup> Thus, critical theorists reject quotas because they foster essentialist notions of identity. Feminist theorists also reject essentialist arguments that imply “that any woman may represent women generally, regardless of social differences.”<sup>77</sup> Anti-essentialist feminism holds that no essential notion of ‘womanhood’ exists.<sup>78</sup> In short, no substantial legal academic movement has arisen to support or defend the legitimacy of quotas in any regard.

Simply stated, U.S. jurisprudence and commentary roundly reject quotas as an unconstitutional violation of the most basic American social tenets. Even as the United States permits affirmative action in racial contexts, arousing French disdain for “communitarianism,” it rejects quotas in race and gender contexts.<sup>79</sup> France, in contrast, directly authorizes quotas in the gender context. However, under its policy of *laïcité*, France refuses to even permit the public collection of data about racial, ethnic, and

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<sup>73</sup> This argument arose in *Shaw v. Reno*, 509 U.S. 630 (1993), in which white voters sued to overturn a majority-minority district.

<sup>74</sup> Maier & Klausen, *supra* note 72, at 4.

<sup>75</sup> For example, the central assumption of critical race theorists is “that American society and its institutions, including its legal institutions, are fundamentally racist, and that racism is not a deviation from the normal operation of American society.” Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, in *CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS* 2, 3 (Dorothy A. Brown ed., 2003).

<sup>76</sup> Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1102–03 (1991) (“Authentic black representation, or ‘descriptive’ representation, is the first important building block for black electoral success theory. Authenticity refers to community-based and culturally rooted leadership. The concept also distinguishes between minority-sponsored and white-sponsored black candidates. Basically, authentic representation describes the psychological value of black representation. The term is suggestive of the essentialist impulse in black political participation: because black officials are black, they are representative. Thus, authenticity reflects the importance of race in defining the character of black political participation.”).

<sup>77</sup> Jane Mansbridge, *The Descriptive Political Representation of Gender: An Anti-Essentialist Argument*, in *HAS LIBERALISM FAILED WOMEN? ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES*, *supra* note 72, at 19.

<sup>78</sup> See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 149 (1999).

<sup>79</sup> Rosenblum, *supra* note 64.

religious minorities.<sup>80</sup> The flexibility in the French constitutional structure permits experimentation and shifting in perspectives on questions such as quotas. Although clearly in violation of basic principles of equality enshrined in the French Constitution and in French history, the facilitating amendments of both Parity and the FCBQ illustrate the malleability of French equality traditions and the judiciary's subordination to the legislature.

The FCBQ stands as an example of the vast legal cultural difference between the United States and France surrounding the treatment of difference and remedies to combat discrimination. Although the constitutional framework of the two countries provokes compelling debates, the next part of this Article examines their impact on corporate governance—in particular, the debate over whether corporations should be governed for the benefit of shareholders or stakeholders.

### III. GOVERNANCE: STAKEHOLDERS OR SHAREHOLDERS

France has an extensive history of public participation in private corporate governance, while U.S. law enshrines principles of freedom of contract and property. Recently, this distinction has been emphasized in the debate over shareholder and stakeholder primacy. Under shareholder primacy, the corporation's goal is to benefit shareholders.<sup>81</sup> This system, which has strengthened over the past few decades,<sup>82</sup> has reached its apogee in the United States as regulators and companies adopt provisions to give shareholders a "say" on everything from corporate policy to executive compensation. In contrast, a stakeholder focus recognizes that shareholders, as simply the owners of a corporation's residual interests, are but one of many entities the corporation exists to serve, and none of these interests is primary. From a contractual standpoint, the rights of bondholders and other creditors come before that of shareholders. Conversely, stakeholder governance reflects the complex link between corporate decision-making and broader societal welfare, including workers, customers, communities, and even governments.<sup>83</sup>

The stakeholder/shareholder debate falls along the lines of a clear and

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<sup>80</sup> Rosenblum, *supra* note 40.

<sup>81</sup> See generally Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189 (2002).

<sup>82</sup> See, e.g., Martin Gelter, *The Pension System and the Rise of Shareholder Primacy*, 43 SETON HALL L. REV. 909, 915–16 (2013) (noting that U.S. corporate governance "from the 1930s to the 1970s . . . was characterized by what is often called 'managerial capitalism'"). For an example of "managerial capitalism" during this time period, see Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (discussing that under this theory, the board of directors balances interests of various stakeholders).

<sup>83</sup> Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 14 J. APPLIED CORP. FIN. 8, 8–9 (2001).

central geographic divide. While corporate governance in the United States rests on shareholder primacy, stakeholder governance is much more commonplace in Europe; it is even part of the regulatory scheme in many countries.<sup>84</sup> For example, several European countries require union representation on the board of directors.<sup>85</sup> This part of the Article articulates the distinction between shareholder and stakeholder visions, and demonstrates how this phenomenon exposes a transatlantic disharmony.

According to stakeholder theory, a corporation's primary purpose is to pursue strategies that advance the interests of stakeholders, which include groups and individuals affected by the corporation.<sup>86</sup> Whereas a shareholder firm has improving investment returns for shareholders as its central goal, a stakeholder firm takes into account the multiple objectives involved with the various interests who have a "stake" in the corporation's endeavors.<sup>87</sup> Examples of stakeholders include workers, customers, communities where the corporation is located, and even governments for those same communities.<sup>88</sup> Stakeholder theory may reflect underlying

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<sup>84</sup> Franklin Allen et al., *Stakeholder Capitalism, Corporate Governance and Firm Value* (Eur. Corp. Gov't Inst., Working Paper No. 190, 2009) (analyzing how legal frameworks ensure stakeholder orientation and how this focus affects competition).

<sup>85</sup> See L. Fulton, *Worker Representation in Europe*, ETUI, <http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2> (last visited May 11, 2014).

<sup>86</sup> R. EDWARD FREEMAN ET AL., *COMPANY STAKEHOLDER RESPONSIBILITY: A NEW APPROACH TO CSR 10* (2005). The authors find that CSR has outlived its usefulness because it promotes the separation theses—the idea that business issues and social issues can be dealt with separately—and focuses on corporations. They also contend that CSR should be replaced with "company stakeholder responsibility," which takes into consideration the intertwined nature of economic, political, social, and ethical issues. See also Sylvia Ayuso et al., *Maximizing Stakeholders' Interests: An Empirical Analysis of the Stakeholder Approach to Corporate Governance* (U. of Navarra, IESE Bus. Sch., Working Paper No. 670, 2007). The authors analyze function at board level, board diversity, and stakeholder engagement. They frame their discussion on a stakeholder model of corporate governance within the perspective of the sustainable and responsible firm whose economic survival depends on its ability to satisfy the needs of its various stakeholders. They conclude that there is evidence that CSR responsibility on the board is positively associated with indicators for dealing with primary and secondary stakeholders but not with a more diverse representation on the board. However, board diversity had a positive impact on firm profitability, similar to stakeholder engagement. See also Silvia Ayuso & Antonio Argandoña, *Responsible Corporate Governance: Towards a Stakeholder Board of Directors?*, 6 CORP. OWNERSHIP & CONTROL 9 (2009). Ayuso and Argandoña analyze the arguments given by different theoretical approaches for linking specific board composition with financial performance and CSR, and discuss the empirical research conducted. Despite inconclusive findings, they argue that diverse stakeholders on the board will promote CSR activities of the firm, but it will also increase board capital—which could ultimately lead to better financial performance.

<sup>87</sup> Gerard Charreaux, *Corporate Governance: Stakeholder Value Versus Shareholder Value*, 5 J. MGMT. GOV'T 107 (2001) ("Unsatisfied with the dominating shareholders' point of view . . . we propose an enlarged definition of the value which may be called the stakeholder value.").

<sup>88</sup> See generally *Ypsilanti v. General Motors Corp.*, 506 N.W.2d 556 (Mich. Ct. App. 1993). General Motors sought tax relief from the town of Ypsilanti in order to make improvements at its Willow Run factory. At a public hearing the plant manager Williams stated that "upon completion of this project and favorable market demand, it will allow Willow Run to continue production and maintain continuous employment for our employees." *Id.* at 561. General Motors later decided to move its production to another region of the country

ethical norms, but it might also be to the corporation's ultimate financial benefit.<sup>89</sup> It may even link to some developments in corporate social responsibility (CSR), also known as socially responsible investing (SRI) in Europe.<sup>90</sup>

When evaluating corporate management, it becomes clear that strategies have direct consequences on stakeholders.<sup>91</sup> Managing a corporation with stakeholders in mind requires executives to "formulate and implement processes which satisfy all and only those groups who have

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and Ypsilanti sued for an injunction. The court held that GM was not liable under the theory of promissory estoppel because the fact that a corporation solicits tax abatements and persuades a municipality to grant them with assurances of jobs is not evidence of a promise.

<sup>89</sup> Some argue that a stakeholder focus is not necessarily solely an ethical issue. In particular, one might argue that the firm can maximize its wealth through a focus on the variety of a firm's engagements, including human capital. See, e.g., Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV. INT'L L.J. 129, 136, 152 (2009) (reasoning that a commitment to stakeholders has an economic purpose rather than reflecting ethical norms). Professor Gelter also suggests that although U.S. corporate governance follows a model that is closer to the team production theory asserted by Blair and Stout, continental Europe has more formal legal mechanisms such as codetermination and pro-employee labor law. *Id.* at 142, 148–54, 155–68. See also Christopher M. Bruner, *Power and Purpose in the "Anglo-American" Corporation*, 50 VA. J. INT'L L. 579, 585, 639–41 (2010) (noting that U.K. corporate governance, as compared to U.S. corporate governance, has more of a focus on shareholder interest because, in the takeover context, health care is not linked to employment status).

<sup>90</sup> Elaine Sternberg, for example, argues that stakeholder theory, while it reflects some ethical considerations, does not go far enough. See generally Elaine Sternberg, *The Stakeholder Concept: A Mistaken Doctrine*, 4 FOUND. BUS. RESP. (1999). Sternberg argues that a stakeholder theory that asserts organizations must be held accountable to their stakeholders is misguided and incapable of providing better corporate governance, business performance, or business conduct. She argues that a better model of business ethics and social responsibility is the author's Ethical Decision Model. Social responsibility is not a responsibility to stakeholders, but a responsibility of stakeholders. It consists of the strategic bestowal or withholding of support for social and economic institutions on the basis of stakeholder values. *Id.* For a discussion of the relationship between stakeholder firms and CSR, see Lorenzo Sacconi, *Corporate Social Responsibility (CSR) as a Model of "Extended" Corporate Governance: An Explanation Based on the Economic Theories of Social Contract, Reputation and Reciprocal Conformism*, 142 LIUC PAPERS IN LAW, ETHICS & ECON. 1 (2005) (Corporate social responsibility can be defined as a form of governance that extends the concept of fiduciary duty from a mono-stakeholder setting—where the relevant stakeholder is the owner—to one where the firm owes fiduciary duties to all its stakeholders—the owners included. For CSR to be widely accepted and successful, it needs a body that promotes social dialogue that creates broad consensus on standards and promotes independent verification of compliance with these standards. It also needs a body that will disseminate necessary information to the public and stakeholders so they can make informed decisions about which organizations to support. These multi-stakeholder bodies would be made up of business associations—for-profit, cooperatives, and non-profit—and representatives of principal stakeholders—trade unions, consumers, environmental associations, local authorities, etc.). For additional discussion of CSR and stakeholder theory, see Leonardo Becchetti et al., *Corporate Social Responsibility and Shareholder's Value: An Empirical Analysis* (Bank of Fin. Research, Discussion Paper 1, 2009) (investigating the impact and relevance of CSR to the capital market and tracing market reactions to corporate entry into and exit from the Domini 400 Social Index—a recognized CSR benchmark).

<sup>91</sup> See generally R. Edward Freeman & John McVea, *A Stakeholder Approach to Strategic Management* (Darden Bus. Sch., Working Paper No. 01-02, 2001).

a stake in the business. The central task in this process is to manage and integrate the relationships and interests of shareholders, employees, customers, suppliers, communities and other groups in a way that ensures the long-term success of the firm.”<sup>92</sup> Shareholder firms, in contrast, focus on “value maximization”—investment gain for shareholders, who may be focused on short-term gains.<sup>93</sup>

As persuasive as stakeholder theory may appear, several critics question whether its fuzzy definition of corporate purpose is a disservice, not only to shareholders, but also to the corporation’s other constituents. Stakeholder theory, for critics, “directs corporate managers to serve ‘many masters’”<sup>94</sup> and supports “special interest groups who wish to . . . enhance their influence over the allocation of corporate resources.”<sup>95</sup> Rather, corporate success depends on clear goals for value—something critics argue is precluded by a stakeholder orientation.<sup>96</sup>

#### A. United States’ Shareholder Primacy

Corporate governance in the United States consistently emphasizes the state’s limited role in regulating private property and private contracts. These “private” economic structures dominate U.S. corporate law and support a notion of shareholder primacy (in contrast to stakeholder governance) that fits into this regulatory regime. The United States’ corporate governance strongly emphasizes the limited role government can and should play in regulating the “private” sector. Descended from the British system of private property and liberty to contract,<sup>97</sup> the United States’ legal framework allows private parties near complete dominion over their property. The permissive regime governing property in the United States is supported by the paucity of restrictions in many areas, including zoning,<sup>98</sup> eminent domain,<sup>99</sup> and the land-marking of significant

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<sup>92</sup> *Id.* at 8.

<sup>93</sup> Jensen, *supra* note 83, at 8–9. *But see* Hansmann & Kraakman, *supra* note 5, at 1 (“There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”).

<sup>94</sup> Jensen, *supra* note 83, at 9.

<sup>95</sup> *Id.* at 15 n.17.

<sup>96</sup> Hansmann & Kraakman, *supra* note 5, at 4–5 (“The collapse of the conglomerate movement in the 1970s and 1980s, however, largely destroyed the normative appeal of the managerialist model. It is now the conventional wisdom that, when managers are given great discretion over corporate investment policies, they mostly end up serving themselves, however well-intentioned they may be. While managerial firms may be in some ways more efficiently responsive to nonshareholder interests than are firms that are more dedicated to serving their shareholders, the price paid in inefficiency of operations and excessive investment in low-value projects is now considered too dear.”).

<sup>97</sup> NIALL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* (2003).

<sup>98</sup> *See* *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>99</sup> *See* *Kelo v. City of New London*, 545 U.S. 469 (2005).

buildings.<sup>100</sup> The regulation of contract law follows an equally liberal model of limited state involvement, in which individuals are presumed to be rational actors empowered to enter into arms-length contracts. The corporation's interest, in U.S. corporate governance, is singular in focus and easy to identify: the shareholders.<sup>101</sup> This overall framework grants extraordinary deference to the corporate entity, in sharp contrast to the corporatist tradition in Europe that accords the state a far greater role in managing the corporate sector both generally and with regard to specific corporations.<sup>102</sup>

The United States' corporate governance discourse has identified the shareholder/stakeholder primacy debate as central. Shareholder primacy regards the corporation as a vehicle for maximizing the shareholders' interests, primarily profits. Boards, directors, and managers of corporations dictated by shareholder primacy focus on increasing investment returns for shareholders.<sup>103</sup> Their bonuses often depend on this performance, and they structure mid- and lower-level workers' goals around increasing returns for investors.

### *1. The Predominance of Agency Theory*

Two iterations of early twentieth century corporate governance demonstrate the historic centrality of shareholder primacy. First, Adolf Berle, the authority on modern corporate governance, played a large role in establishing the legitimacy of shareholder primacy. His concern, at the end of the 1920s, was the increasingly centralized nature of corporate power, which he and his collaborator Gardiner Means projected would continue

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<sup>100</sup> See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

<sup>101</sup> Hansmann & Kraakman, *supra* note 5, at 10 ("Of course, asserting the primacy of shareholder interests in corporate law does not imply that the interests of corporate stakeholders must or should go unprotected. It merely indicates that the most efficacious legal mechanisms for protecting the interests of nonshareholder constituencies—or at least all constituencies other than creditors—lie outside of corporate law. For workers, this includes the law of labor contracting, pension law, health and safety law, and antidiscrimination law. For consumers, it includes product safety regulation, warranty law, tort law governing product liability, antitrust law, and mandatory disclosure of product contents and characteristics. For the public at large, it includes environmental law and the law of nuisance and mass torts."). One might even say that the business judgment rule's deferential standard favors shareholder interests. In the corporate governance context, the business judgment rule typifies the high level of deference courts extend to corporations and their boards in making determinations about the corporation's behavior. This standard requires board members to perform their duties in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the director(s) reasonably believes to be in the best interests of the corporation. See, e.g., *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). The presumption is that, "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Id.*

<sup>102</sup> For a discussion of corporatist policies in France, see Suk, *supra* note 53.

<sup>103</sup> Ayuso & Argandoña, *supra* note 86, at 9–10.



and transform the economy within decades.<sup>104</sup> Berle and Means's founding text, *The Modern Corporation and Private Property*, was based on the observation that the increasing liquidity of the U.S. financial markets had brought about a separation between capital ownership and management, concentrating excessive power in the hands of managers.<sup>105</sup> This precipitated the reaction of re-balancing power in favor of shareholders and placing greater limits on managers to force them to prioritize the interests of the corporation over their own selfish interests.<sup>106</sup> These premises are based on the economic model of agency theory, which was first developed by Michael Jensen and William Meckling,<sup>107</sup> and led to the affirmation of the superior power of shareholders.

As the Great Depression commenced, Berle worked with candidate and later President Franklin D. Roosevelt to enunciate a formulation of economic policy and corporate regulation that included shareholder primacy, enforced by the courts, as a key mechanism for remedying the excesses of the 1920s. Through Berle's articulation of shareholder primacy, a broad and diverse population of shareholders could control corporate managers, thereby mitigating the increasing concentration of economic power.<sup>108</sup>

Second, the classic American case, *Dodge v. Ford*, which predated Berle's work by a decade, raised this very question, although not in these exact terms.<sup>109</sup> In that case, the Dodge brothers, owners of Dodge Motor

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<sup>104</sup> William W. Bratton & Michael L. Wachter, *Tracking Berle's Footsteps: The Trail of The Modern Corporation's Last Chapter*, 33 SEATTLE U. L. REV. 849 (2010); see also William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation*, 34 J. CORP. L. 99 (2008).

<sup>105</sup> ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (Harcourt, Brace & World, Inc. ed., 1968); Adolf A. Berle, *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932); Adolf A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931).

<sup>106</sup> Antoine Rebérioux, *Gouvernance d'entreprise et contrôle des dirigeants: 1932–2008, d'une crise à l'autre*, in LES GOUVERNANCES DES SOCIÉTÉS COTÉES FACE À LA CRISE: POUR UNE MEILLEURE PROTECTION DE L'INTÉRÊT SOCIAL 5–6 (L.G.D.J. ed., 2010).

<sup>107</sup> See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

<sup>108</sup> At the time, Means's projections sent a clear message: something had to be done about corporate power, something more than Berle had thought previously. Berle changed his views accordingly. What he formerly saw as a governance problem to be treated contractually within the financial community now came to be seen as a case for judicial control in the name of the shareholder interest. See sources cited *supra* note 105.

<sup>109</sup> *Dodge v. Ford*, 170 N.W. 668 (Mich. 1919). This case is widely recognized as an endorsement of shareholder primacy. See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 549 (2003) ("Dodge's theory of shareholder wealth maximization has been widely accepted by courts over an extended period of time."); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 739 (2005); Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 535–36 (2006) ("*Dodge v. Ford Motor Co.* remains the high-water mark for shareholder primacy.").

Company, then a competitor to Ford Motor Company, owned a ten percent stake in Ford.<sup>110</sup> Ford's profits were extraordinary after the development of the assembly line, and the vision of its president was similarly grandiose. Henry Ford declared, "My ambition . . . is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business."<sup>111</sup> The Dodges sought to force Ford to issue a dividend to shareholders, an action Ford strongly resisted, claiming a cautious preference for maintaining substantial cash balances in case of emergency.<sup>112</sup> Ford lost on the dividend issue, as the *Dodge* Court held that the corporation exists primarily for the shareholders' benefit.<sup>113</sup> Although the law has since shifted in favor of giving greater deference to management's choices regarding the dispensation of profits, the principal of shareholder primacy remains a core value of corporate governance theory.

## *2. The Paradox of Agency Theory*

In a literal sense, shareholder primacy is a misnomer: shareholders may be first in priority of duty owed, but they are last in right. The shareholder's legal right over the corporation is not that of an owner—rather the shareholder "owns" a residual interest in the corporation's profits. This interest is last in right because all other creditors have the right to recover funds *prior* to the shareholder receiving any part of any profits. Moreover, bondholders, and any other party with whom the corporation has contractual privity, step ahead of shareholders in claims against the corporation. Since shareholders' interests are residual, corporate governance norms place shareholders in the position of power both as the parties who elect the board of directors, and as the central beneficiaries of corporate success. Even the most ardent advocate of shareholder primacy would never challenge the actual primacy of bondholders.<sup>114</sup> Resistance to shareholder primacy, in addition to the

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<sup>110</sup> *Dodge*, 170 N.W. at 670–71.

<sup>111</sup> *Id.* at 671.

<sup>112</sup> *Id.* at 676–77.

<sup>113</sup> *Id.* It is worth noting, however, that some object to this case's celebrity. See, e.g., Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008).

<sup>114</sup> Stout, *supra* note 81, at 1190 ("[W]e have made at least some intellectual progress over the intervening decades on the question of the proper role of the corporation. In particular we have learned that some of the most frequently raised arguments for shareholder primacy are, not to put too fine a point on it, bad arguments. By 'bad' arguments, I do not mean arguments that are somehow morally offensive or normatively unattractive. Rather, I mean arguments that are, as a positive matter, inaccurate, incorrect, and unpersuasive to the careful and neutral observer."). It is worth noting that the growing importance of intangible assets is reshaping the basic conditions of corporate governance: "The aim is twofold: i) to explain logically why intangible assets modifies the allocation of residual claims, as company performance can substantially affect the wealth of other stakeholders ii) to determine which

increasingly growing support for CSR, created the space for stakeholder theory.

In recent years, even during the current financial crisis, shareholder primacy has only gained traction. One important provision in the Dodd-Frank legislation authorizes shareholders to have nonbinding votes to approve executive pay.<sup>115</sup> These “say on pay” rules do not significantly increase actual shareholder power, but they do convey that the empowerment of shareholders may serve as a brake on excessive corporate behavior.<sup>116</sup>

In short, although stakeholder theory in the United States has become fairly elaborate, it remains a largely theoretical endeavor as shareholder theory continues to hold the preeminent place in practical corporate governance.

### B. France’s Stakeholder Primacy

The shareholder structure in many European Union states differs from that of the United States, even for large firms. In Germany, France, and other European nations, ownership has historically been much more concentrated as banks, families, the state, and, most importantly, other non-financial corporations comprise the majority of large shareholders. These ownership patterns could lead to the assumption that the separation of ownership and control is *prima facie* irrelevant. This assumption is not entirely true—the separation of ownership from control can occur through different means<sup>117</sup>—but many European countries progressively adopted a more stakeholder-oriented approach as skepticism about capitalism rose,

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constituencies should be considered as relevant stakeholders and contribute, to some extent, to the corporate governance.” Arturo Capasso, *Stakeholder Theory and Corporate Governance: The Role of Intangible Assets 2* (European Corp. Gov’t Inst., Working Paper, 2004) (“Company law says that shareholders own the assets and the free cash flows, but this only works on the basis of a primitive view of the nature of ownership and employment. The crucial intangible assets could be, in many cases, out of the direct control of either shareholders or management. They are, in fact, shared in common between the firm and some of its stakeholders, like employees, customers, suppliers. In order to build and enhance its intangible endowment a firm has to establish and consolidate a trustworthy fiduciary relationship between the firm and these stakeholders.”).

<sup>115</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 951(a)(1) (2010).

<sup>116</sup> See Andrew C.W. Lund, *Say on Pay’s Bundling Problems*, 99 KY. L.J. 119 (2010).

<sup>117</sup> A corporation with concentrated ownership can come within the managerial category due to the identity of its large shareholders, if the latter are not interested in controlling managers. For instance, “cross-shareholding networks in Germany have this very effect since they are used as a shield against control oriented shareholders’ influence.” ALAN DIGNAM & MICHAEL GALANIS, *THE GLOBALIZATION OF CORPORATE GOVERNANCE* 7 (2009). In France, where families are very present in large companies, the scale of operations often demands the delegation of control to a large managerial hierarchy. Moreover, concentrated ownership does not mean majority. What was called the “noyaux durs” in the 1980s in France meant that the new privatized corporation was still kept by a concentrated ownership, but was too small to have a majority for important decisions like takeovers or big strategic changes.

core governance shortcomings were revealed, and the concomitant need for reform in the EU became clear in the wake of hard financial times.<sup>118</sup>

### *1. Stakeholder-Oriented Corporate Governance*

The preceding section reviewed corporate governance debates in terms of shareholder values. Whereas economists once asserted, on the grounds that price reflects the scarcity of resources, that management should aim to maximize shareholders wealth,<sup>119</sup> many Europeans, at least to a greater extent than their U.S. counterparts, believe that corporations should serve a larger social purpose and be “responsible,” that is, they should reach out to other stakeholders and not only to shareholders.<sup>120</sup> This perspective draws on fundamental beliefs about the role of the state and the private sector, which differ between the United States and the European Union. Corporate decisions have a significant effect on various groups, such as employees, communities, and creditors. Thus proponents of stakeholder governance contend that the effect of these decisions should compel corporations to recognize ethical considerations and duties toward these groups.

Two issues should be mentioned before discussing the implementation of stakeholder-oriented corporate governance. First, there is the paradox that U.S. economists have elaborated stakeholder theory more than in Europe,<sup>121</sup> even though European corporations pay far more attention to

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<sup>118</sup> The European Commission adopted a proposal on April 16, 2013 for a directive enhancing the transparency of certain large companies on social and environmental matters. This Directive amends the Accounting Directives (Fourth and Seventh Accounting Directives on Annual and Consolidated Accounts, 78/660/EEC and 83/349/EEC, respectively). The objective is to increase EU companies’ transparency and performance on environmental and social matters, and, therefore, to contribute effectively to long-term economic growth and employment. Companies concerned will need to disclose information on policies, risks and results as regards environmental matters, social and employee-related aspects, respect for human rights, anti-corruption and bribery issues, and diversity on the boards of directors. On February 6, 2013, the European Parliament adopted two resolutions acknowledging the importance of company transparency in these fields. See Comm. on Legal Affairs, Eur. Parl., Report on Corporate Social Responsibility: Accountable, Transparent and Responsible Business Behavior and Sustainable Growth, A7-0017/2013 (Feb. 6, 2013), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0017+0+DOC+XML+V0//EN>; Comm. on Employment and Social Affairs, Eur. Parl., Report on Corporate Social Responsibility: Promoting Society’s Interests and a Route to Sustainable and Inclusive Recovery, A7-0023/2013 (Feb. 6, 2013), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0023&language=EN>.

<sup>119</sup> See JEAN TIROLE, *THE THEORY OF CORPORATE FINANCE* 14–73 (2006).

<sup>120</sup> Hansmann & Kraakman, *supra* note 5, at 4 (“Recent academic literature has focused on the “stakeholder” model of the corporation as the principal alternative to the shareholder-oriented model. The stakeholder model, however, is essentially just a combination of elements found in the older manager-oriented and labor-oriented models.”).

<sup>121</sup> Martin Gelter, *Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light*, 7 N.Y.U. J.L. & BUS. 641, 676–718 (2011) (discussing the historical

stakeholders in their governance and their practices.<sup>122</sup> Second, we must clarify to what the concept exactly refers. Stakeholder-oriented corporate governance can have two different meanings.<sup>123</sup> On the one hand, the stakeholder concept may refer to a “broad mission of the management.”<sup>124</sup> According to this view, management should aim at maximizing surplus from the sum of the various stakeholders. On the other hand, the stakeholder-oriented corporate governance may refer to the sharing of control by stakeholders,<sup>125</sup> such as codetermination in Germany. Presumably, the two notions are related.<sup>126</sup> For instance, it would be hard for a manager to sacrifice profit to benefit a stakeholder not directly associated with the company or its management. Further, by including stakeholders that are in control of the company, it can be presumed that they will consider the stakeholders in management’s mission.

This synthesized definition has a two-fold impact on the implementation of stakeholder-oriented corporate governance. First, it gives priority to long-term strategy. According to the “broad mission of the management” concept, managers have to pay attention not only to shareholders’ interest, but also to the interests of employees, creditors, and the public. These new managerial missions naturally imply that the corporation’s existence is presumed to be robust and profitable into the future. The managerial vision thus becomes more long-term focused rather than short-term.<sup>127</sup>

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debates on stakeholder theory in Germany and France).

<sup>122</sup> At the time Adolf Berle and Gardiner Means started elaborating the foundations of what became the economic model of agency theory, a debate took place between Berle and E. Merrick Dodd over how to tackle the issue of separation between property and control. Dodd followed a novel pluralist approach as he sought to expand the theory of “corporate realism” to include corporate social responsibility. He accepted that the corporation is a real entity, distinct from its shareholders, but similar to any other real person, that entity has a social role and should be subjected to the principles of citizenship. Thus, in the case of corporate citizens, purely economic self-interest (i.e., profit maximization), may be subjected to other social objectives. The adoption of a realist stance is crucial for the plausibility of this assertion. Thus, when Dodd detached the corporate interest from shareholder interests, CSR could be inserted. Having dealt with the definition problem of the corporate interests in this manner, Dodd was able to engage upon the accountability issue. In a realistic view, since managers had to discharge their duties in accordance with the SR entity that is distinct from its shareholders, they should also be expected to have “a sense of responsibility toward employees, consumers, and the general public.” See E. Merrick Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); E. Merrick Dodd, *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194 (1935). In other words, Dodd’s answer to the debate’s question was that managers are trustees for the corporation as SR person rather than for the shareholders as Berle believed.

<sup>123</sup> TIROLE, *supra* note 119, at 56.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> This priority strengthens the firm establishment of stable shareholding in the capital of large companies, a little like the “hard cores” of the 1980s. For a redefinition of this notion, see Yann Paclot, *Le gouvernement d’entreprise, pour quoi faire? Quelques reflexions en relisant le code de gouvernement d’entreprise des sociétés cotées*, in LES GOUVERNANCES DES SOCIÉTÉS COTÉES FACE À LA CRISE: POUR UNE

Second, this synthesized definition compels one to re-examine the notion of the “corporation’s interest.” The argument can be challenged to the extent that the notions of “profit” and “value” are distinguishable. Corporate governance recommendations today, at least in European countries, seek to provide economic operators with the means to create value.<sup>128</sup> This is nothing new, given that it was already the underlying idea of agency theory. The analysis differs today in that it reverts to a more respectful notion of the corporation, regarded as a legal person, independent of its associates, who are not the “owners” of the corporation itself. Corporations indeed appear to have a broader objective than merely creating shareholder value, which results in distinguishing between the corporation’s interest and the common interest of the shareholders.<sup>129</sup> “Creating value” would thus suppose that the corporation itself grows more valuable, and not solely that its shareholders grow richer.<sup>130</sup>

This notion naturally implies that the corporation is durable, profitable, and even prosperous. In this respect, the corporation’s interest does not begin and end with the shareholders’ interest, but implies taking into account all the interests that companies must guarantee. Recognition of a corporation’s broader interest and the aims of governance as they have just been set out, tally perfectly: corporate bodies must fulfill their mission to protect the corporation’s interest. In other words, they must create value for the benefit of all the stakeholders. The resurgence of the corporation’s

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MEILLEURE PROTECTION DE L’INTÉRÊT SOCIAL 279 (L.G.D.J. ed., 2010). Several studies prove that companies with a core body of shareholders perform better and that increasing shareholder power during hostile takeover bids is appropriate. New activism is emerging, in favour of legal tools, which enable both shareholders and managers to adopt long-term strategies. This is seen in France by marked opposition to returning to the principle of proportional votes, and in the double voting right granted to white squares by Code de commerce Article L225-43. This concern is also shared by ethical investment funds in which good governance practices, such as sustainable development and ethical commitments, are key factors of assessment by market players. It is interesting to note that the crisis does not appear to have weakened the trend in favour of socially responsible investing. Catherine Malecki, *l’Investissement socialement responsable: quelques remarques sur une valeur montante de la gouvernance d’entreprise*, in LES GOUVERNANCES DES SOCIÉTÉS COTÉES FACE À LA CRISE: POUR UNE MEILLEURE PROTECTION DE L’INTÉRÊT SOCIAL 263 (L.G.D.J. ed., 2010). With 37% growth in a time of crisis, CSR confirms its status as a “safe investment” and provides the advantage, today, of insisting upon the “green economy.” See generally MANUEL FLAM, *L’ÉCONOMIE VERTE* (2010).

<sup>128</sup> See *supra* note 13 and accompanying text.

<sup>129</sup> TIROLE, *supra* note 119, at 56–62; PIERRE-YVES GOMEZ & HARRY KORINE, *L’ENTREPRISE DANS LA DÉMOCRATIE: UNE THÉORIE POLITIQUE DU GOUVERNEMENT DES ENTREPRISES* (De Boeck ed., 2009).

<sup>130</sup> It is interesting to note that even U.K. legislation seems to have shifted toward a more stakeholder-oriented concept. The enactment of Section 172 of the Companies Act 2006 in the U.K. has codified the duty to act in the interest of the company. Now, the director of a U.K. company must act in a way they consider, in good faith, to be most likely to promote the success of the company “for the benefit of its members as a whole and in doing so must have regard to the interests of employees, the environment, the local community, suppliers and customers.” Companies Act, 2006, c. 46, § 172 (U.K.).

interest,<sup>131</sup> of which corporate officers are the guardians, is central to new theories seeking to distinguish the company's interests from the ones who own parts of its capital. In light of this notion, the role of executives can be redefined, and corporation management can be integrated into a company's long-term scheme.<sup>132</sup>

One core objection to stakeholder governance is that it may weaken the governance structure overall. One issue with the sharing of control between investors and natural stakeholders is that it focuses less on income generation than would be the case with exclusive investor control.<sup>133</sup> But two arguments can be made to address that objection. First, when priority is given to a long-term strategy, it strengthens the establishment of stable shareholding in the capital of large companies. Historically, France experimented with this in the 1980s, with the so-called "hard core."<sup>134</sup> Today, the concern is also shared by ethical investment funds in which good governance practices, such as sustainable development and ethical commitments, are key factors of assessment by market players.<sup>135</sup>

Even though it is by no means synonymous with a stakeholder approach, CSR has become a relevant financing tool for listed corporations. To date, it has survived despite the financial crisis.<sup>136</sup> Since 2012, the European Commission defines corporate social responsibility as "the responsibility of enterprises for their impacts on society."<sup>137</sup> To fully meet their social responsibility, enterprises "should have in place a process to integrate social, environmental, ethical human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders."<sup>138</sup> CSR allows collective or individual investment based on social, ethical, environmental, or corporate governance criteria. Even though its variety may be a source of complexity, it nonetheless

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<sup>131</sup> For a redefinition of this notion, see Paclot, *supra* note 127, at 279.

<sup>132</sup> See François Guy Trébulle, *Stakeholder Theory et Droit des Sociétés*, 12 BULL. JOLY SOCIÉTÉS 1337 (2006); François Guy Trébulle, *Stakeholder theory et droit des sociétés*, 1 BULL. JOLY SOCIÉTÉS 7 (2007); Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism—and Unleash a Wave of Innovation and Growth*, HARV. BUS. REV., Jan.–Feb. 2011; Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV., Dec. 2006, at 78–92; Geoffrey Heal et al., *Corporate Social Responsibility: Doing Well by Doing Good?* (Wharton Sch. Working Paper, Sept. 2005); P. Escande, *RSE: Michael Porter plaide pour la shared value*, LES ECHOS (Mar. 14, 2011).

<sup>133</sup> TIROLE, *supra* note 119, at 59–60.

<sup>134</sup> Again, what was called the "noyaux durs" in the 1980's in France, or *hard core*, meant that the new privatized corporation was still kept by a concentrated ownership, but it was too small to have a majority on important decisions like takeovers or big strategic changes.

<sup>135</sup> It is interesting to note that the crisis does not appear to have weakened the trend in favour of socially responsible investing. See Malecki, *supra* note 127.

<sup>136</sup> With 37% growth in a time of crisis, CSR confirms its status as a safe investment and provides the advantage, today, of insisting upon the green economy. See generally FLAM, *supra* note 127.

<sup>137</sup> *Corporate Social Responsibility (CSR)*, EUR. COMM'N, [http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm) (last visited Nov. 16, 2013).

<sup>138</sup> *Id.*

offers an important new way of investing. Despite its differences from stakeholder-focused governance, the relevant feature of CSR is that, unlike most common funds, it considers long-term profitability more important than short-term profitability. CSR can involve socially responsible funds—or so-called sustainable development funds—that focus on the adherence of companies to sustainable development criteria (Scandinavian countries and Germany are developing more of the “green funds” technique) or exclusion funds (more faithful to the initial concept born in the United States with the Quaker movement, which prohibited its members from investing in companies operating in the weapons, tobacco, or even alcohol industries). Thus, these funds are open to *long-term* institutional investors who are aware that, far from being a “marketing” concern, these funds make it possible to consider, within long-term strategies, questions relative to climate change, threats to fundamental human rights, and matters surrounding corporate governance. Therefore, CSR is at the heart of stakeholder-oriented governance and expands stakeholder values into labor and environmental laws.

Managerial accountability constitutes another issue for stakeholder-oriented corporate governance. Unlike an executive with a well-defined mission to maximize shareholder value—viewed as an objective task—the socially-oriented manager faces a wide range of missions, most of which are, by nature, not entirely measurable.<sup>139</sup> Concretely, it may be that the management’s invocation of multiple and hard-to-measure missions would serve as an excuse for “self-serving behavior,” making managers less accountable.<sup>140</sup> This argument suggests that the competency criterion should be restored.<sup>141</sup>

The corporate governance debates reviewed in this Article show a radical theoretical dichotomy between the U.S. approach of corporate governance and the European one. The next part will show that these variations are deeply rooted in a cultural context.<sup>142</sup>

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<sup>139</sup> TIROLE, *supra* note 119, at 60.

<sup>140</sup> *Id.*

<sup>141</sup> One criticism of stakeholder-orientated governance is that it leaves the corporation with “two masters”—stakeholders and shareholders—with the concomitant cost. Increased capital costs attend to the stakeholder-oriented firms in the United States.

<sup>142</sup> So far, demonstrations of this new conception of governance have been limited to giving rules of law a remedial role, correcting certain cognitive mistakes made by executives. This stage would now appear to be behind us, given the European Community’s establishment in 2008 of a much more promising rule, that of compliance, or, to refer to its true English origin, “comply or explain.” Introduced on July 3, 2008 transposing a provision of EC Directive 2006/46, this rule stipulates that “when it voluntarily refers to a corporate governance code,” a listed corporation must specify in the report enclosed with the management report “the provisions it has set aside and why,” or, if it “does not refer to such a code,” it must state, in the same report “the rules applied in addition to legal requirements and the reasons why it decided not to apply any provision of the code.” Council Directive 2006/46, 2006 O.J. (L 224) 1 (EC); Véronique Magnier, *La règle de conformité ou l’illustration d’une acculturation méthodologique complexe*, in LES GOUVERNANCES DES SOCIÉTÉS COTÉES FACE À LA



## 2. French Corporatism and the Role of Stakeholders

The U.S. system of corporate governance is characterized by the largest businesses listed on securities markets with a very large shareholding base.<sup>143</sup> This base interacts with management at an arm's length basis. Thus, the state's role in regulating private property and private contracts is limited. At the opposite end of the spectrum, European countries' systems are traditionally characterized by the relative unimportance of the securities market as a source of finance.<sup>144</sup> According to this tradition, the principal sources of finance in a country such as France are banks, families, non-financial corporations, and the government.<sup>145</sup> Shareholdings tend to be more concentrated, and shareholders, organized labor, government, and creditors are more actively involved in the control of companies. Financing now may be largely globalized as investors fund corporations without much regard to their domicile, a factor that may diminish the "Frenchness" of French corporations. Even so, the continued presence of the French state as a large shareholder in key industries gives it extensive influence, both formal and informal, over economic activity within France.

Until the nineteenth century, full incorporation could not take place unless a special charter was granted by statute or decree.<sup>146</sup> The state was heavily involved in the incorporation process. That is, for groups of individuals to become legal persons, or corporations, a license from the state was necessary. The 1866 law on incorporation, however, allowed a group of individuals to become a corporation, without any concession from the state; only registration was necessary.<sup>147</sup> Still, many sectors of the economy remained under the control of the state, which owned the capital of a great number of companies. Strategic sectors like defense, of course, were state owned.<sup>148</sup> Additionally, railways, transportation, and electricity were the full

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CRISE: POUR UNE MEILLEURE PROTECTION DE L'INTÉRÊT SOCIAL 250 (L.G.D.J. ed., 2010). Compliance, or rather non-compliance, is an opportunity for companies; it brings flexibility and is a real tool for preventing cognitive errors in that, without imposing anything, the law suggests and models. On these changes to the rules of law in general, see CATHERINE THIBIERGE, *LA FORCE NORMATIVE, NAISSANCE D'UN CONCEPT* (2010). It provides an "architecture of choices," which executives can simply use as a basis for decision-making, but it still needs to be aided by a culture of motivation. *See generally* Cass R. Sustein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2008).

<sup>143</sup> *See generally* MICHEL ALBERT, *CAPITALISME CONTRE CAPITALISME* (Seuil ed., 1991).

<sup>144</sup> DIGNAM & GALANIS, *supra* note 117.

<sup>145</sup> *See generally* GOMEZ & KORINE, *supra* note 129.

<sup>146</sup> MICHEL GERMAIN & VÉRONIQUE MAGNIER, *TRAITÉ DE DROIT DES AFFAIRES: TOME 2, LES SOCIÉTÉS COMMERCIALES* (20th ed. 2011).

<sup>147</sup> GEORGES RIPERT, *ASPECTS JURIDIQUES DU CAPITALISME MODERNE* (1951).

<sup>148</sup> *See generally* GOMEZ & KORINE, *supra* note 129.

property of the state and submitted to specific public regulation.<sup>149</sup>

The institutional arrangements coming out of the Bretton Woods Agreements in 1944 emerged from post-war devastation and aimed to create a stable macroeconomic environment that would ensure continuous investment and growth.<sup>150</sup> Within that international framework, national governments were able to implement expansionary policies, which ensured that effective demand was sufficient to absorb increasing industrial output.<sup>151</sup> As part of this process of reconstruction, this post-war period was characterized in France as a movement toward “nationalization.”<sup>152</sup> Nationalization entails the transfer of property from the private sector to the state. The state then recapitalizes many large companies with public money. This movement started no later than December 1944 with the nationalization of Renault, and then, in December 1945, with banks such as Crédit Lyonnais, le Comptoir National d’Escompte de Paris, la Banque Nationale pour le Commerce et l’Industrie, and la Société Générale.<sup>153</sup> It ended in 1948 with coal, gas and electricity, insurance companies, and transportation.<sup>154</sup> In October 1946, the preamble of the newly drafted Constitution stressed the importance of this political decision to recapitalize a major part of the private economy with public funds.<sup>155</sup>

Although privatization developed for decades, this progression shifted when President Mitterrand undertook a wave of nationalizations in the eighties. Seven big industrial companies (such as Thomson, Rhône-Poulenc and Saint-Gobain) and almost thirty banks became held by the state. France belongs to the so-called “insider” systems, where shareholdings tend to be more concentrated, and government and (public) creditors are more actively involved in the control of the corporations.<sup>156</sup> French corporatism reflects the role of the state in the private sector and a commensurate acquiescence to public goals within the private sector. These public goals necessarily implicate issues and participation supported by stakeholders. As a result, the French corporate governance system in the private sector is stakeholder oriented and forms part of a tightly woven protective social market infrastructure

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> GOMEZ & KORINE, *supra* note 129

<sup>155</sup> 1946 CONST. pmbl., art. 9 (Fr.) (“Tout bien, toute entreprise, dont l’exploitation a ou acquiert les caractères d’un service public national ou d’un monopole de fait, doit devenir la propriété de la collectivité.”).

<sup>156</sup> DIGNAM & GALANIS, *supra* note 117, at chs. 2, 5.

#### IV. CURRENCY OF STAKEHOLDER PRACTICE

The theoretical debate surrounding corporate governance already appears in legal jurisdictions at the national, European, and international levels, and its controversy continues to increase.

##### A. The EU and Growing International Interest in Stakeholder-Oriented Corporate Governance

Currently, several factors, both economic and more general, have prompted the European Commission to question the state of corporate governance on both a micro- and macro-economic level in order to restore confidence in the single market for shareholders and for all other stakeholders in society.<sup>157</sup> The global financial crisis exposed the limits of the present system of governance of financial institutions. The volatility of the global marketplace struck every developed economy, in nearly all sectors. Without bringing the fundamentals of the governance of private law companies into question in this post-crisis period, policymakers should concern themselves with the development of corporate governance, which, by nature, is not static.

Different shareholding structures of companies result in differing governance and performance.<sup>158</sup> For example, in France, one-third of businesses listed on a regulated market use dispersed shareholding whereas two-thirds of businesses use a dominant family shareholding.<sup>159</sup> Therefore, of particular concern are those in the first third, as family businesses are traditionally better managed and perform better.<sup>160</sup> We must bear in mind that important points of departure exist between the U.S. and European financial systems. One interesting difference relates to the size of the stock market. Anglo-Saxon countries have well-developed stock markets, whereas in Europe, stock markets are smaller. Further, in France and Germany, many relatively large firms choose to remain private.<sup>161</sup> There are also wide variations in the concentration of shares across countries. Family-owned firms play a major role.<sup>162</sup> Firms with one controlling owner are not rare and, frequently, family-controlled firms have top managers from the controlling family. In contrast, ownership concentration is much smaller in Anglo-Saxon countries and ownership is largely dispersed in the United States. A last point of departure between the two

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<sup>157</sup> See generally EUR. PARL. DOC. (COM 608) (2011).

<sup>158</sup> See generally Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737 (1995).

<sup>159</sup> GOMEZ & KORINE, *supra* note 129.

<sup>160</sup> David Sraer & David Thesmar, *Performance and Behavior of Family Firms: Evidence from the French Stock Market*, 4 J. EUR. ECON. ASS'N 709 (2007).

<sup>161</sup> TIROLE, *supra* note 119.

<sup>162</sup> GOMEZ & KORINE, *supra* note 129.

systems is the degree of stability of stockholdings. Institutional investors dominate liquidity trading in the United States. They reshuffle their portfolios frequently. German investors have traditionally been long-term investors. The turnover rate is thus an important difference between the United States and Europe, and these differences have a significant impact on corporation practices. Therefore, the solutions imposed on U.S. companies do not necessarily apply to European companies, whose shareholders are more concentrated.<sup>163</sup>

According to several recent European studies, including one on the European Corporate Governance Framework, the aim of corporate governance should be to create value for shareholders *and* stakeholders.<sup>164</sup> Indeed, OECD norms reflect this perspective. The OECD effectively defines corporate governance as “the system by which companies are directed and controlled” and as “a set of relationships between a corporation’s management, its board, its shareholders, and its other stakeholders.”<sup>165</sup>

Another important European shift in this direction, with the ultimate aim being the prosperity and long-term future of the company, is the emergence of sustainable development in its most recent forms. Originally, CSR<sup>166</sup> was a matter of self-regulation. Its aim was to correct “the natural

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<sup>163</sup> Shleifer & Vishny, *supra* note 158, at 737–83.

<sup>164</sup> See FLAM, *supra* note 127. PIERRE-YVES Gomez, *Propos conclusifs*, in LES GOUVERNANCES DES SOCIÉTÉS COTÉES FACE À LA CRISE: POUR UNE MEILLEURE PROTECTION DE L'INTÉRÊT SOCIAL 290 (L.G.D.J. ed., 2010).

<sup>165</sup> OECD, PRINCIPLES OF CORP. GOVERNANCE 11 (2004), available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf>.

<sup>166</sup> By tradition, the leading CSR market on its own represents 65% of CSR funds, though it also exists in Canada, South Africa, Asia, Morocco, and naturally, in the Scandinavian countries. In France, the Novethic indicator is indicative of the constant growth of CSR, while the leader in the French market is Dexia AM. Insurance companies, pension funds, and collective investment undertakings are increasingly sensitive to CSR. Companies in the chemical and petroleum sectors, clearly the most concerned by CSR, and even more so banking establishments that are in charge of accompanying industrial investments, pay very particular attention to CSR. Since 2005, the CERES annual reports have clearly indicated an change of attitude in the banking sector, which is including environmental data as part of risk management. CSR is at the heart of the stakeholder approach, through the values that it spreads into labor and environmental laws, and France, which has been concerned with corporate governance issues since the beginning of 2000s, has recently been sensitive to this trend. Hence, the burden of social and environmental duties weighing on listed corporations has been strengthened by the passage of the Grenelle II Act. Since 2001, French law required listed companies to report in their annual report on “how the corporation is taking into account the social and environmental consequences of its activities.” Loi 2010-788 du 12 juillet 2010 portant engagement national pour l’environnement [Law 2010-788 of July 12, 2010 on the National Commitment for the Environment], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], July 13, 2010, p. 12905. The implementing decree of the 2001 law (February 20, 2002) drew up a list of social and environmental information that the corporation was required to provide, ranging from the consumption of water resources, raw materials and energy, greenhouse gas emissions, and equality of opportunity between men and women to the inclusion of the disabled. The weakness of the CSR is that it is based on voluntary commitments, and the 2001 law provided for no specific sanction in the event that the information obligation is not respected. Still, the Grenelle II Act, passed in July 2010, in addition to extending the scope of this

effects of markets, in response to the expectations of other than economic actors in contemporary societies.”<sup>167</sup> Therefore, it was defined by the European Commission as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a *voluntary* basis.”<sup>168</sup> Despite CSR’s voluntary origins, the European Commission recently turned its attention to redefining it. A recent, non-binding communication states that CSR may turn out to merely be “the responsibility of enterprises for their impact on society.”<sup>169</sup> Nor is this change in emphasis an isolated occurrence. International Standard ISO 26000<sup>170</sup> actually goes further, *requiring* companies to adopt “transparent and ethical behaviour that contributes to sustainable development.”<sup>171</sup> Thus, CSR is moving away from a voluntary basis to a required method of conducting corporate governance.

In limited companies, the guarantors of the corporation’s interest are the board of directors and the supervisory board, not shareholders. The latter may, legitimately, vote in favor of their own self-serving interests—for example, by fixing a high rate of dividends, despite the fact that such a rate would impede the development of the business. The role of the board of directors and the supervisory board to protect the corporations’ interest is thus vital to good corporate governance. Moreover, the reflections of the 1992 Cadbury Report, the precursor to all other European corporate governance codes, and the first governance committees presided over by Marc Viénot in France, were dedicated to the effective functioning of the board of directors.

The emergence of a broadly defined corporate interest, as stakeholder theory understands it, now reinforces the custom of stable shareholdings in the capital of large companies and encourages directors to adopt a more long-term strategy.

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information to almost all companies, makes the obligation of information enforceable.

<sup>167</sup> Michel Doucin, *Dimension internationale de la responsabilité sociale et environnementale*, in DÉVELOPPEMENT DURABLE ET ENTREPRISE 15–22 (Véronique Magnier & Laurent Fonbaustier eds., 2013).

<sup>168</sup> *Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, at 6, COM (2011) 681 final (Oct. 25, 2011), available at [http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item\\_id=5511](http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=5511).

<sup>169</sup> EUR. PARL. DOC. (COM 681) 2 (2011).

<sup>170</sup> ISO 26000 provides guidance on social responsibility (SR). Eighty countries and thirty-nine organizations with liaison status are participating in the SR working group under the joint leadership of ISO members from Brazil (ABNT) and Sweden (SIS). The main stakeholder groups are represented: industry, government, labor, consumers, nongovernmental organizations, service, support, research, and others, as well as a geographical and gender-based balance of participants. *ISO 26000 Social Responsibility*, INT’L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/home/standards/iso26000.htm> (last visited Mar. 12, 2014).

<sup>171</sup> ISO 26000 defines CSR as “the responsibility of an organisation for the impact of its decisions and activities on society and the environment, through transparent and ethical behaviour that contributes to sustainable development.” *Id.*

## B. Structural Differentials

The board of directors plays a central role in corporate governance, and one crucial characteristic to consider is whether that board has one or two tiers. Typically, Germany employs a traditional two-tier model that is known in Europe as the “Rhine model.”<sup>172</sup> Recently, there were significant legal changes to board structures in Europe. This subpart explores the core elements of French and German boards that distinguish them from U.S. boards, and articulates the structural basis for stakeholderism in European board governance.

### *1. One and Two-Tiered Boards: Contrasting French and German Governance*

In Germany, as in other European countries—including the Netherlands, Austria, Poland, and Portugal—a two-tier board with separated management and supervisory boards is required.<sup>173</sup> Two-tier boards have existed since 1619 in the Netherlands.<sup>174</sup> Legal regimes separate management from control. Mandatory incompatibility rules support this separation, which stipulates that members of the supervisory board are forbidden from being directors, and vice-versa. In practice, though, the supervisory board has rarely limited itself to mere control and instead has taken on an advisory function. As Klaus Hopt explains:

[T]he division between the tasks of the management board and the supervisory board varies according to business sector, size of the corporation, tradition and, in particular, the presence of strong leaders on the board or the other. Sometimes the chairman of the management board, alone or together with the chairman of the supervisory board, selects the members of the supervisory board without much ado, though formally they must be elected by shareholders. Sometimes the chairman of the supervisory board is the leading figure on whose benevolence the chairman of the management board depends, and who picks the other supervisory members and proposes them to the shareholders.<sup>175</sup>

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<sup>172</sup> See generally ALBERT, *supra* note 143.

<sup>173</sup> Klaus J. Hopt, *Comparative Corporate Governance: the State of the Art and International Regulation*, 59 AM. J. COMP. L. 1 (2011).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 21.

In a single-tier system, which is commonplace in the United States, shareholders elect board members to one board, which oversees the entire corporation. For U.S. firms, the two-tier system can appear to be quite sophisticated and complicated, in part because the supervisory role may implicate distinct duties in different firms. In a two-tier board structure, there is an executive board and a supervisory board. In Germany, the latter is composed entirely of nonexecutive board members, half of whom are labor representatives. In Germany, the main reason for the strict maintenance of the two-tier board is the politically cemented policy of labor codetermination, which is hardly tolerable for shareholders in a one-tier system.

In 1966, France introduced the possibility of choosing a two-tier model, but many corporations still retain the traditional one-tier system. The study of numerous French and European companies reveals that a high majority of boards of directors in France (eighty percent of companies in the CAC 40) in comparison to supervisory boards.<sup>176</sup> In the aftermath of the financial crisis, many corporations that had initially chosen a two-tier system shifted to a one-tier model for economic and flexibility reasons.<sup>177</sup>

French law defines how the board is designated. In a one-tier system, shareholders select members of the board. In practice, however, members of the board are first identified and chosen by the president director general, with the help of the nomination committee. The Corporations Act contains very few provisions regarding the composition of the board, with the exception of provisions relating to the minimum (3) and maximum (18) size, the duration of office, and the gender quota. Staggered boards and cumulative voting are not permitted, nor is mandatory minority shareholder representation. Indeed, in France, few prescriptions for the board structure exist, rendering the codetermination requirement a distinct feature of German board governance.

Since 2001, the chairman of the board of directors does not assume, in principle, the general direction of the corporation. This role has devolved to the chief executive officer, who is fully autonomous within the corporation and not subordinate to the chairperson. It should be noted, however, that the chairman may also—but is not obliged to—exercise the functions of chief executive officer.<sup>178</sup> Studies show that the separation of powers between the chairman and chief executive officer in single-tier companies is in rapid decline. In fact, the proportion of directing chairpersons

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<sup>176</sup> Alain Pietrancosta, Paul-Henri Dubois & Romain Garçon, *Corporate Boards in France*, in *CORPORATE BOARDS IN EUROPEAN LAW: A COMPARATIVE ANALYSIS IN EUROPE* 175, 185 (2014).

<sup>177</sup> Christophe Perchet, *Pertinence et pérennité de la SA avec conseil d'administration*, 4 BULLETIN JOLY SOCIÉTÉS 440, § 86 (2009) (explaining this preference with reference to the numerous disadvantages associated with the dualist model—most importantly the unsatisfactory distribution of powers and responsibilities between the directors and the supervisory board—and the multiple advantages of the monist model).

<sup>178</sup> CODE DE COMMERCE [C. COM.] art. 225-51-1, para. 1 (Fr.).

increased in 2011, reaching fifty-five percent of companies on the index.<sup>179</sup>

The board of directors is responsible for deciding whether the functions of the chief executive officer are to be exercised by the chairman of the board or by another individual.<sup>180</sup> The articles of incorporation must define the conditions under which the board of directors decides this matter. Thus, a particular majority of the board may be required for approval, or it may be necessary to adhere to a specific time period (for example, the end of the current mandate) before passing from one method to another. Shareholders may be informed of the decision of the board of directors, either at any time of year upon request—this right forms part of the shareholders' permanent communication right<sup>181</sup>—or annually at the general meeting. According to the AFEP-MEDEF Corporate Governance Code, "[i]t is essential for the shareholders and third parties to be fully informed of the choice made."<sup>182</sup> Listed companies that have chosen to refer to this code must account for their choice through compliance with the "comply or explain" rule.<sup>183</sup>

Practitioners are conscious of the risk to the reputation of big French companies posed by investing an excess of power in an individual rather than an office. As the Vivendi and Société Générale cases have shown, the fall of a very charismatic chief executive officer damages the corporation's image.<sup>184</sup> Consequently, a new figure has gradually emerged in businesses with boards of directors in which the functions of the chairperson of the board and chief executive officer are still united: the lead director (*administrateur référent*). The characteristics, duties, and prerogatives of this director are defined for the most part in the internal regulations of the board of directors. Primarily, the aim is to guarantee the prerogatives of the board of directors and respect good governance practices in the context of a directorship exercised by a Chairman-CEO.<sup>185</sup> The AMF, which encourages this practice in hopes of preventing conflicts of interest associated with holding the dual functions of CEO and chairman,<sup>186</sup>

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<sup>179</sup> See ERNST & YOUNG, PANORAMA DES PRATIQUES DE GOUVERNANCE DES SOCIÉTÉS COTÉES FRANÇAISES (2012), available at [http://www.ey.com/Publication/vwLUAssets/Etude\\_Gouvernance\\_2012/\\$FILE/Etude\\_Gouvernance\\_2012.pdf](http://www.ey.com/Publication/vwLUAssets/Etude_Gouvernance_2012/$FILE/Etude_Gouvernance_2012.pdf).

<sup>180</sup> CODE DE COMMERCE [C. COM.] art. 225-51-1, para. 2 (Fr.).

<sup>181</sup> FRANCIS LEFEBVRE, MÉMENTO PRATIQUE: SOCIÉTÉS COMMERCIALES (2011).

<sup>182</sup> ASS'N FRANÇAISE DE ENTREPRISES PRIVÉES & MOUVEMENT DES ENTREPRISES DE FRANCE [AFEP-MEDEF], CORPORATE GOVERNANCE CODE OF LISTED CORPORATIONS 4 (2013), available at <http://total.com/en/AFEP-MEDEF-code>.

<sup>183</sup> Under French law, internal regulations are not required by law, but almost all listed companies have them.

<sup>184</sup> See, e.g., Florence Renard-Gourdon, *Le sept vies de Jean-Marie Messier*, LESECHOS.FR (Jan. 21, 2011), <http://www.lesechos.fr/entreprises-secteurs/tech-medias/dossier/300390167/300390167-les-sept-vies-de-jean-marie-messier-99922.php>.

<sup>185</sup> It is worth noting that the United States has seen a significant push by shareholders and proxy advisors to split the Chair from the CEO position.

<sup>186</sup> AUTORITÉ DES MARCHÉS FINANCIERS, RAPPORT 2010 DE L'AMF SUR LE GOUVERNEMENT



recommends that companies which have put a lead director in place precisely define his role and duties along with the means and prerogatives he possesses. The AMF envisages that the functions of this individual will be further refined during the evaluation of the board of directors or in the report of the chairman on the governance of the corporation.

Moreover, independent directors, as distinguished from non-executive directors and outside directors, are considered an important aspect of corporate governance in France. Although French law does not require the independence of directors, the AFEP-MEDEF states that, for listed companies without a controlling shareholder, half of the directors must be independent, and in other companies, at least a third.<sup>187</sup> Independent directors should account for two-thirds of the audit committee, and on other committees, half of the members should be independent.<sup>188</sup> This role for independent directors reflects a European trend in corporate governance that focuses on board composition. The actual criteria for independence, however, remain unclear—specifically who should determine the independence of a non-executive director. There has been no consensus on this issue in France or in Europe.<sup>189</sup>

## 2. *Representation of Labor on Boards*

In many European countries, there is mandatory codetermination, but in such cases, labor usually represents one-third of board membership.<sup>190</sup> For example, Germany traditionally has the most stringent rule regarding codetermination.<sup>191</sup> That occurred as a result of Germany's need to stabilize its economy after WWII, and, therefore, relies on the "social peace" theory that appeals to dialogue and negotiations between managers and workers. Consequently, Germany mandates shareholder and labor membership parity on the supervisory board. This mandated parity exists in conjunction with a mandatory large size (more than twenty), and a two-tier structure. Commenting on this structure, Hansmann and Kraakman note that "[t]oday, even inside Germany, few commentators argue for codetermination as a general model for corporate law in other jurisdictions. Rather, codetermination now tends to be defended in Germany as, at most, a workable adaptation to local interests and circumstances or, even more modestly, as an experiment of questionable value that would now be

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D'ENTREPRISE ET LA RÉMUNÉRATION DES DIRIGEANTS [AMF REPORT ON CORPORATE GOVERNANCE AND THE REMUNERATION OF DIRECTORS] (July 12, 2010).

<sup>187</sup> See CODE DE GOUVERNEMENT D'ENTREPRISE DES SOCIÉTÉS COTÉES [CORPORATE GOVERNMENT CODE], art. 9 (2013) (Fr.).

<sup>188</sup> *Id.*

<sup>189</sup> Hopt, *supra* note 173, at 2720.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

politically difficult to undo.”<sup>192</sup> Regardless of whether labor codetermination continues as a result of tradition or an ongoing belief in its contributions, it does accord this centrally important stakeholder some shared role in governance.

France, conversely, is more circumspect about labor participation on the board of directors. France has recently and cautiously followed the trend toward codetermination by giving labor, under certain circumstances, up to two seats on the board of a listed corporation, whether it is a one- or a two-tier system. Since 2002, this is a voluntary option, provided that employees own more than three percent of the capital. This choice is determined by shareholders who vote on whether to give these two seats to labor representatives. In practice, “shareholders are not fond of labor codetermination, because it diminishes the power of their own candidates and seriously weaken[s] their role in the decision-making of the board.”<sup>193</sup> It should be noted that, in France, worker representatives also dislike this codetermination approach, evidenced by their reticence to have their anti-capitalist perspective co-opted into the corporate structure.<sup>194</sup> Under this approach, labor law is considered much more protective of workers than corporate law.

Accordingly, apart from the right to be represented on the board, labor rights in France are protected by other mechanisms. For example, the European Takeover Directive 2004/25/EC of 21 April 2004 provides for information rights of labor representatives of the two corporations involved in a bid as soon as it has been made public.<sup>195</sup> The offer document must contain information relevant to the bidder’s intention with regard to the future business of the target corporation and the likely repercussions for employment. Later, there must also be information for, and consultation with, the representative’s employees. More generally, although traditionally protective of employees’ rights, French labor law is becoming more protective thanks to the EU directives.<sup>196</sup>

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<sup>192</sup> Hansmann & Kraakman, *supra* note 5, at 5–6.

<sup>193</sup> *Id.* at 53.

<sup>194</sup> Unions in the U.K. were skeptical for the same reasons during the 1970s when codetermination was considered. *See generally* ALAN BULLOCK & BARRON BULLOCK, REPORT OF THE COMMITTEE OF INQUIRY INTO INDUSTRIAL DEMOCRACY (1977).

<sup>195</sup> Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids, 2004 O.J. (L 142) 12.

<sup>196</sup> *See, e.g.*, Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 Establishing a General Framework for Informing and Consulting Employees in the European Community, 2002 O.J. (L 80) 29; Council Directive 94/45/EC of 22 September 1994 on the Establishment of a European Works Council or a Procedure in Community-scale Undertakings and Community-scale Groups of Undertakings for the Purposes of Informing and Consulting Employees, 1994 O.J. (L 254) 64.

### C. Possible Effect of FCBQ on Stakeholders

The FCBQ will, over the course of a short period of time, force the inclusion of a critical mass of women on the boards of French corporations. Even though France already accords substantial room for stakeholder interests, it seems likely that the FCBQ will further increase the stakeholder orientation of those corporations. As a descriptive matter, more women will populate corporate boards.

Here, “descriptive” has a specific meaning. Hanna Pitkin first explored this concept in *The Concept of Representation*,<sup>197</sup> where she distinguished “descriptive” from “interest” representation.<sup>198</sup> Her work focused on the context of political representation, in which she addressed how “descriptive” representation involves “a descriptive likeness between representatives and those for whom they stand.”<sup>199</sup> This is representation by identity. In this sense, “[a] representative legislature, like a map or a mirror, is essentially an inanimate object, a representation of the people in the sense that a painting is a representation of what it depicts.”<sup>200</sup> A descriptive legislature must mirror the public. In such a case, one ought to be represented because of what one is, not for what one does or believes.<sup>201</sup> Pitkin criticized descriptive representation as a static portrait of a society in which a group’s representation resides in someone with a like trait.<sup>202</sup> By contrast, “interest” representation is about the expression of ideas. Interest representation involves a common belief or idea that finds representation in someone who agrees with that ideology, without regard to identity.<sup>203</sup>

In the corporate context, “descriptive” and “interest” representation help explain the effects of the quota with regard to stakeholder interests. Stakeholder interests can take the form of either descriptive or interest representation. Although stakeholder perspectives often relate to ideas such as environmental concerns, they can also involve descriptive representation, such as the presence of worker representatives on a board, a requirement common to many European corporate governance regimes.<sup>204</sup> Descriptive representation encompasses certain elements of women’s presence on corporate boards. Women on boards can serve a symbolic role.<sup>205</sup> As the parties who oversee management, boards sit at the top of the

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<sup>197</sup> HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* (1967).

<sup>198</sup> For an argument regarding the centrality of interest representation for lesbian and gay political representation, see generally Darren Rosenblum, *Geographically Sexual?: Advancing Lesbian and Gay Interests Through Proportional Representation*, 31 HARV. C. R.-C.L. L. REV. 119 (1996).

<sup>199</sup> PITKIN, *supra* note 197 at 11.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 10.

<sup>202</sup> *Id.*; Guinier, *supra* note 76, at 1102.

<sup>203</sup> PITKIN, *supra* note 197; Rosenblum, *supra* note 198, at 121.

<sup>204</sup> See *supra* Part IV.B.2.

<sup>205</sup> PITKIN, *supra* note 197.

corporate hierarchy, and the inclusion of women conveys to women lower in the hierarchy that their ambition will not be frustrated based on their gender.

Within European corporate governance culture, women may play a role comparable to that played by labor representatives. Like labor representatives, they would be present because of their identity as women. Women's presence reflects their place at the table in a similar sense to that of labor. Women differ from labor representatives because the board will select them for membership, whereas unions themselves select their representatives as separately chosen board members.

Unlike labor representatives (who presumably favor protecting workers' rights), a woman has no necessary interests in common with other women. Women's descriptive representation on boards cannot be assumed to imply any congruence of interests. To assert that women on a corporate board will represent women's interests requires leaps of logic beyond the scope of this Article. Without belaboring this point, which will be addressed elsewhere,<sup>206</sup> it would be challenging to formulate what common opinions women hold. It would be a daunting task just to determine which female stakeholders demographic is represented by the women on the board. One can imagine a broad swath of diverse groups of women: women employees, women management, women customers, community members, and even girls who may eventually seek elevated corporate posts could all constitute a group that would conceivably have some stakeholder interest in women on boards. Even if one were to fix an appropriate set of these groups, what common interests might they hold? Although the women on boards clearly qualify as a discrete group, their interests would be difficult to enumerate.<sup>207</sup>

Briefly, we cannot assume that a specific woman, or even a group of

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<sup>206</sup> Darren Rosenblum will explore questions of identity more closely in a subsequent paper.

<sup>207</sup> The anti-essentialist's desire to avoid "tokenism" caused by descriptive representation has led to calls for interest representation. Representing ideas rather than identity permits a more fluid conception of identity, be it gender, race, or sexual orientation. See generally Lani Guinier, *No Two Seats: The Quest for Political Equality*, 77 VA. L. REV. 1413, 1462 (1991). Representation of interests prioritizes one's political perspective over one's identity. It is worth noting that essentialist identities could also lead to interest representation: another critique of descriptive representation centers on the fact that it is unclear how to achieve a fair sample of the electorate. See generally Bernard Grofman, *Should Representatives Be Typical of their Constituents?*, in REPRESENTATION AND REDISTRICTING ISSUES (Bernard Grofman et. al. eds., 1982). Thus, while anti-essentialism necessitates interest representation, interest representation does not require an anti-essentialist understanding of identity. If identity has no causal relation to ideas, representing individuals based on interest becomes paramount in a democracy. The challenge with interest representation for women is the indeterminacy of what policies women prefer. Social science reflects some preferences among women for some policies, but these preferences may not be easily predictable. For example, Esther Duflo has examined women's quotas in India, studying the political preferences of women in certain villages and inquiring whether women representatives reflect those preferences. Her conclusion is that such a connection does exist. See Esther Duflo, *Why Political Reservations?*, 3 J. EUR. ECON. ASS'N 668, 668–78 (2005).

women, on a corporate board will hold any specific interest.<sup>208</sup> To assert that “women” have some natural commonality with other “women” requires an essentialist conception of sex difference.<sup>209</sup> Given that “[t]he advocacy of descriptive representation can emphasize the worst features of essentialism,”<sup>210</sup> it is hard to justify descriptive representation. Nonetheless, without descriptive representation or some identity marking the

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<sup>208</sup> This reflects current understandings of the nature of sex difference, which have veered away from presuming an “essential” aspect to sex difference, toward the recognition of the diversity among individuals that crosses the sexes. Judith Butler and other gender theorists articulate understandings of gender grounded in performativity rather than fundamental traits. Anti-essentialist feminism holds that no essential notion of “womanhood” exists. Black feminists such as Bell Hooks and Kimberle Crenshaw have emphasized the white nature of such concepts, asserting that one cannot separate race from gender.

<sup>209</sup> Gender theorists, led by U.S. thinkers such as Judith Butler, hold that notions of “womanhood” depend exclusively on cultural constructs, hence the use of “gender” rather than “sex” reflects a constructed, rather than biological, phenomenon. These doubts lead to a counter theory that identity does not determine ideas. For example, anti-essentialists reject presumptions that women are hard-wired nurturers, ascribing such behaviors to cultural constructs. The construction of gender cannot be discussed without consideration of transgendered identity. Transgendered identity demonstrates the mutability of gender. Transgendered people expose the fallacy of the presumption that humanity is composed solely of men and women—“gender binarism” calls into question the viability of a fifty-fifty scheme for representation unless there is some implicit recognition of how to include transgendered people in this scheme. See generally, Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499 (2000). Although the essentialism debate primarily arises with regard to gender, many have raised such questions with regard to race. See KWAME ANTHONY APPIAH, IN MY FATHER’S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE 45 (1992).

<sup>209</sup> The dichotomy between descriptive and interest representation parallels a dichotomy in the women’s identity debate between essentialism and anti-essentialism. There appears to be a necessary relationship between these dichotomies. Women’s representation quotas appear to presume that a woman can only be represented by a woman. Quotas in this sense rely on essentialism. Anti-essentialist theory undermines such notions of fixed identity. To essentialists, it is without meaning to be a woman as opposed to a man. This theory, it would appear, can only serve to question quotas for women’s representation. Anti-essentialists would hold that a woman is no more likely to represent women’s interests than a man. The extension of this is that if women, as a group, have no traits in common, then having fifty percent of all candidates does not achieve any greater likelihood of representing women. Even with a presumption of essentialist identity, one can arrive at the need for interest representation. But can anti-essentialism lead one to support descriptive representation? The question of women’s representation, it seems, cannot be answered with context-less advocacy that ignores key anti-essentialist lessons in advocating that women be guaranteed seats to represent women. Any particular woman cannot be presumed to represent any other woman, or women as a whole, for that matter. Becker, for example, seems to advocate that women be guaranteed seats to represent women, without addressing complexities of identity. The intriguing element of this issue is that, the above anti-essentialist truths notwithstanding, they cannot necessarily be generalized: simply because an individual woman cannot be assumed to represent another woman does not mean that if half the legislature were women that this legislature would do no better in voicing women’s interests than an entirely male legislature. Although one’s body cannot fully determine one’s politics, some relation must be present. Perhaps a solution is suggested by Gayatri Spivak’s idea of strategic essentialism, or Judith Butler’s idea of “contingent epistemology.” GAYATRI SPIVAK, IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS (1987).

<sup>210</sup> Mansbridge, *supra* note 77, at 30.

representative and the people represented, quotas cannot exist. The reality of the existence of corporate board quotas cannot be separated from enforcing some level of descriptive representation of women.

It can be asserted that the presence of women at the top of the corporate hierarchy will necessarily have an impact on the fundamental nature of European corporate governance. In contrast with other corporate cultures, European corporations will have more women in more prominent positions. Even without presuming some interest commonality, as a descriptive matter, European corporate culture will be feminized in the literal sense of having more women participants, particularly in contrast with the rest of the developed world where women constitute a far smaller percentage of board members.

As clear as the descriptive argument may be that women's presence renders a corporation more stakeholder-friendly, as a matter of interest representation, it remains unclear as to what the impact will be. As we established, the presence of women on the boards of France's (and possibly Europe's) largest companies will lead to great descriptive representation of women on the board, and this descriptive representation, in one important yet simple sense, will result in an increase in stakeholder governance as women (at least descriptively) constitute stakeholders. Even if the group "women" in this corporate context does not necessarily share some values that lead to distinct results, their presence may provide some stakeholder representation for women workers, consumers, and community members. At the outside, a potential exists that policies such as childcare and other issues may shift, but this truly depends on whether people inhabiting the category "women" have any common interest.

Some studies demonstrate that "women" actually have distinct perspectives. If women board members hew to stereotypes (as some studies suggest), they would attend to vulnerable populations. In a landmark study on women's political representation in India, Esther Duflo demonstrated that women leaders do in fact hold different opinions from male leaders, and these opinions match their represented populations by sex.<sup>211</sup> If Duflo's assertions were correct in a broader sense, women board members may attend to stakeholder needs, whether those stakeholders are women, workers, parents, or other vulnerable populations whose interests may be marginalized in a shareholder-driven governance. Indeed, as David Matsa and Amalia Miller's work explores, women in upper management may help advance other women.<sup>212</sup> Work that inherently requires creative problem solving aspects would benefit from diversity, but in the corporate governance context, the effect is tempered because of the nature of the

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<sup>211</sup> Raghavendra Chattopadhyay & Esther Duflo, *Women as Policy Makers: Evidence from a Randomized Policy Experiment in India*, 72 *ECONOMETRICA* 1409 (2004).

<sup>212</sup> David Matsa & Amalia Miller, *Chipping Away at the Glass Ceiling: Gender Spillovers in Corporate Leadership*, 101 *AM. ECON. REV.: PAPERS AND PROCEEDINGS* 635-39 (2011).

work performed by boards.<sup>213</sup> The feminization of corporate governance, brought about by CBQs in the European context, may lead to still more stakeholder-oriented governance. Even if this phenomenon occurs in a small percentage of corporations, it may lead to a notable shift in governance overall.

#### D. CBQs and the Possible Effect on Entrenched Director Interests

Two counterexamples still exist in and deeply hamper French corporate governance practice: first, the exclusive social network of directors, and second, the number of cumulative mandates. The FCBQ will help challenge both of these traditional pitfalls.

One crucial concern regarding the composition of boards in French corporations seems to be only partially addressed at the present moment: the lack of socio-economic diversity on these boards. The AFEF-MEDEF Code says nothing about necessary social diversity.<sup>214</sup> Moreover, it does not tackle a related issue and great French “exception”—the very strong representation and predominance of some *Grandes Écoles* on the boards of directors of large listed companies.<sup>215</sup> Without question, everywhere, the market for corporate directors is narrow. This is understandable as very specific skills and expertise are required for such a position. It may also be a sociological tropism: this phenomenon is not unique to the French system, but also exists in the United States (with Ivy League graduates) and in the United Kingdom (with graduates of prestigious universities like Oxford). However, France is a particularly well-suited and atypical case.<sup>216</sup> The sociological literature documents that, among French business elites, two broad and distinct networks coexist: engineers (*École Polytechnique*) and former high-ranking civil servants (*École Nationale d’Administration*).<sup>217</sup>

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<sup>213</sup> The work of Scott Page and Jonathan Macey are informative for this point. Page’s work identifies that diversity provides effective results in tasks that require creativity as opposed to simple repetitive tasks. But what is the nature of the tasks for corporate boards? Macey’s work divides the tasks of corporate boards into monitoring work and management duties. The inherent function of overseeing and approving work doesn’t lend itself to shifts in decision making as a result of increased board diversity. These themes that examine the nature of diversity and its effect on board shifts is the focus in subsequent work. See Darren Rosenblum & Daria Roithmayr, *Sex Regimes and Corporate Governance* 65 (Working Paper) (on file with author).

<sup>214</sup> See *supra* note 16 and accompanying text.

<sup>215</sup> Bang Dang Nguyen, *Does the Rolodex Matter? Corporate Elite’s Small World and the Effectiveness of Board Directors*, 58 MGMT. SCI. 236, 236 (2012); Francis Kramaz & David Thesmar, *Social Networks in the Boardroom* 7 (Institute for the Study of Labor (IZA), Discussion Paper No. 1940, 2006).

<sup>216</sup> *Id.* at 2.

<sup>217</sup> See David Swartz, *French Interlocking Directorships: Financial and Industrial Groups*, in NETWORKS OF CORPORATE POWER: A COMPARATIVE ANALYSIS OF TEN COUNTRIES (Frans N. Stokman ed., 1985); David Swartz, *French Corporate Leadership: A Class Based Technocracy*, 2 RES. POL. SOC. 49 (1986); Charles Kadushin, *Friendship Among the French Financial Elite*, 60 AM. SOC.

Elites are highly concentrated so that these two schools are overrepresented among top executives. Moreover, these educational programs are the “virtually unique way”<sup>218</sup> of entering high-level jobs. A recent study, based on reliable empirical findings, demonstrated that the presence of developed social networks within boards of directors can have a very strong impact on the composition of such boards, and a highly negative influence on corporate governance practices.<sup>219</sup> Although this is one study, one can easily imagine that the impact of a small social network, say of people from the same school or even the same graduating class, might deploy shortcuts in decision making out of trust for one another in ways that diverse individuals would not.

Another concern has emerged, a legal one, explaining that the French issue of lack of diversity is not only linked to a sociological cause—an exclusive social network club—but also to the legally prescribed pitfall of cumulative proxies. The issue of concurrently held mandates has long preoccupied France. Originally, the Law of July 24, 1966 limited the number of mandates that may be concurrently held to eight.<sup>220</sup> The Law of May 15, 2001 reduced this number to five mandates on boards of directors, and the AFEP-MEDEF now recommends the presence of a high number of independent directors on boards and various committees.<sup>221</sup> Despite these developments, statistical studies continue to show a very high level of director-consanguinity between CAC 40 and SBF 120 companies.<sup>222</sup> Just under half of all mandates in the CAC 40 are held by a quarter of their directors.<sup>223</sup> There are certain SBF 120 companies in which four people are executives, but this remains quite rare. Moreover, French law allows several exceptions to the five mandates rule. In particular, mandates held concurrently within a related group of companies only count as one. Furthermore, mandates held abroad are not counted. In addition to the difficulties of interpretation to which this law has given rise, these exceptions are not justified. There is no generalized method for counting mandates, and the limit on concurrently held mandates do not apply to all limited companies, private companies, and joint-stock companies.

Although the French case is not unique,<sup>224</sup> it seems that France has

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REV. 202 (1995); Kenneth A. Frank & Jeffrey Y. Yasumoto, *Linking Action to Social Structure Within a System: Social Capital Within and Between Subgroups*, 104 AM. J. SOC. 642 (1998).

<sup>218</sup> Kramaz & Thesmar, *supra* note 215, at 3.

<sup>219</sup> *Id.*; Nguyen, *supra* note 215.

<sup>220</sup> Loi 66-537 du 24 juillet 1966 sur les sociétés commerciales [Law 66-537 of July 24, 1966 on Commercial Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 26, 1966, p. 6402.

<sup>221</sup> CODE DE COMMERCE [C. COM.] art. L225-21 (Fr.).

<sup>222</sup> Kramaz & Thesmar, *supra* note 215; see also HELEN H. BOLLAERT ET AL., IESEG SCH. OF MGMT., CORPORATE GOVERNANCE AND PERFORMANCE OF FRENCH LISTED COMPANIES (2010).

<sup>223</sup> Kramaz & Thesmar, *supra* note 215.

<sup>224</sup> Nguyen, *supra* note 215.



had the most difficulty in combating the cumulative issue. The concurrent holding of mandates presents three disadvantages: it reduces the variety of points of view, limits the renewal of boards of directors, and encourages the exchange of “services rendered” among board members who consequently give each other reciprocal *carte blanche*.<sup>225</sup> More recent concerns against multiple directorships have focused on the challenges of dividing one’s focus among several firms, an issue that has surfaced in Norway after the implementation of their corporate board quota.

In spite of its shortcomings, the FCBQ marks an important first step toward diversification, even if it is defined by *mixité* of the sexes rather than a broader *diversité*. First, without question, a feminized corporate culture will *appear* different, as women, many of whom have different sets of professional experiences, take the positions once held by men on corporate boards. Some quota advocates have argued that women’s differences will shift corporate culture in a positive fashion. Such traits include process elements such as women’s purported penchant for detail and aversion to risk. There is also the potential that women’s alleged concern for social welfare might lead to more socially minded corporations, ones that may attend to the interests of weaker parties in market economies.

We previously observed a correlation between the intervention of the legislature and the recent improvement seen in CAC 40 companies in terms of gender equality. Further, we noted that this quantitative progress can be evidenced through certain qualitative improvements, given the correlation observed between the boards of directors and a certain degree of rejuvenation and diversification of skills and points of view on how to run a business. In addition, the introduction of more international profiles in the French boards will diminish the presence of the solid networks of directors of *Grandes Écoles* graduates, reduce the tendency towards a concentration of monitoring structures, and prevent the risk of director-consanguinity. In practical terms, the participation of women on boards of directors offers a larger pool of skills and expertise than when the search for skills is limited to the masculine gender.

Second, the inclusion of women on corporate boards at the mandated critical mass levels may shift corporations toward an increased stakeholder focus. In a simplistic, measurable, and identitarian fashion, women on corporate boards will descriptively represent women workers, customers/clients, and other stakeholder communities, even if the

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<sup>225</sup> There remains debate as to whether “sufficient diversity” should be required. Some argue that a corporation, even a listed one, is still a private body and should, thus, be free to choose the members of its board of directors or supervisory board. Direct intervention by public authorities or by the European Commission in the composition of boards of directors seems neither realistic nor desirable. It appears that such a result would best be achieved with recourse to corporate governance rules recommending greater sociological diversity, which may include professionals, academics, foreigners, and stakeholders. The FCBQ should help shift corporate governance towards more diversity.

shareholders that elect them will drive most decision-making. The question surfaces whether women on boards will actually represent a “women’s” stakeholder interest. To make this assertion depends on the veracity of sex stereotypes. Here, should certain stereotypical differences hold, women’s presence on boards may be better for employees, as one French study suggests. Women-inclusive boards may also focus more on long-term economic results, thus resisting shareholder pressures to attend to short-term profits. Such boards may also strike a more attentive posture toward other communities. The possible shift toward stakeholder values may result in gender quotas changing a great deal more than gender equality.

## V. CONCLUSION: PROSPECTIVE TRANSATLANTIC CHASM

This Article has argued that the FCBQ will likely further shift French corporate governance towards a stakeholder model. It has also asserted that, as more European countries adopt their own CBQs, this shift may occur in those countries as well. Thus, the end result may well be an even more stakeholder-oriented European culture of corporate governance—one that stands in marked contrast with the United States. Paradoxically, the paucity of European theory of stakeholder governance appears to be offset by the profusion of stakeholder practice in European corporate governance. The reverse appears to be true in the United States, where shareholder primacy reigns even in the wake of the financial crisis. It may have even drawn additional strength within the United States as shareholders accrue more power, through “say on pay” provisions, for example. Cultural and sociological variations in the European context and that of the United States underscore curious differences between the world’s largest economies.

These findings contradict the assumption of prevalence, not to say superiority, of one corporate governance model over another. Prior to the financial crisis, it was customary to presume that the harmonization of governance would lead to alignment of corporate governance across economies and cultures. The discrepancies between shareholder theory and practice within each of the world’s two largest economies reveal that this harmonization is at best tenuous. Understanding the contrast between shareholder and stakeholder-oriented practice matters because theory and corporate governance transformation are strongly linked in the United States. Additionally, the shareholder supremacy scholarship has been influential in framing the rules, including those articulated in Dodd-Frank, upon which the process of globalizing capital markets is based. It remains to be seen whether the stakeholder orientation of European corporate governance will remain solely descriptive or if it will encompass the representation of interests as well. We have yet to observe whether the link between CBQs and a stakeholder frame will remain a defining, uniquely European focus for corporate legal governance, or whether this model will

spread to other economies, thus reducing Europe's distinctiveness with respect to corporate governance. Although it was tempting to establish a hierarchy of corporate governance theories,<sup>226</sup> recent reforms undertaken in European countries, most notably the FCBQ, demonstrate that we are not far from the "End of Globalization,"<sup>227</sup> especially in a post-crisis era. Globalization brought with it rhetoric that rational transnational capital was omnipotent and would force the harmonization of legal regimes across the world's major economies. The effects of FCBQ and similar laws to reinforce the stakeholder/shareholder dichotomy suggest that the prospect of a harmonized world of uniform corporate governance may be far from inevitable.

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<sup>226</sup> Steven M.H. Wallman, *Understanding the Purpose of a Corporation: An Introduction*, 24 J. CORP. L. 807 (1999); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1998); Jensen, *supra* note 83.

<sup>227</sup> DIGNAM & GALANIS, *supra* note 117, at ch. 9.